CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 **MAY 26, 2004** **NO. 22**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

CBP Decisions

(CBP Dec. 04–15)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR APRIL, 2004

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None

European Union euro:

April 1, 2004	$1.235800
April 2, 2004	1.210900
April 3, 2004	1.210900
April 4, 2004	1.210900
April 5, 2004	1.200800
April 6, 2004	1.208900
April 7, 2004	1.217100
April 8, 2004	1.208800
April 9, 2004	1.210200
April 10, 2004	1.210200
April 11, 2004	1.210200
April 12, 2004	1.206800
April 13, 2004	1.192300
April 14, 2004	1.194000
April 15, 2004	1.191400
April 16, 2004	1.202500
April 17, 2004	1.202500
April 18, 2004	1.202500
April 19, 2004	1.201900
April 20, 2004	1.191000
April 21, 2004	1.185300
April 22, 2004	1.186100
April 23, 2004	1.180200
April 24, 2004	1.180200

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for April 2004 (continued):

European Union euro: (continued):

April 25, 2004	1.180200
April 26, 2004	1.185100
April 27, 2004	1.192700
April 28, 2004	1.183000
April 29, 2004	1.194500
April 30, 2004	1.197500

South Korea won:

April 1, 2004	$0.000876
April 2, 2004	.000876
April 3, 2004	.000876
April 4, 2004	.000876
April 5, 2004	.000874
April 6, 2004	.000869
April 7, 2004	.000875
April 8, 2004	.000873
April 9, 2004	.000874
April 10, 2004	.000874
April 11, 2004	.000874
April 12, 2004	.000876
April 13, 2004	.000876
April 14, 2004	.000864
April 15, 2004	.000867
April 16, 2004	.000860
April 17, 2004	.000860
April 18, 2004	.000860
April 19, 2004	.000867
April 20, 2004	.000866
April 21, 2004	.000865
April 22, 2004	.000862
April 23, 2004	.000863
April 24, 2004	.000863
April 25, 2004	.000863
April 26, 2004	.000865
April 27, 2004	.000867
April 28, 2004	.000864
April 29, 2004	.000854
April 30, 2004	.000852

Taiwan N.T. dollar:

April 1, 2004	$0.030404
April 2, 2004	.030303
April 3, 2004	.030303
April 4, 2004	.030303
April 5, 2004	.030404
April 6, 2004	.030367
April 7, 2004	.030358
April 8, 2004	.030441

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for April 2004 (continued):

Taiwan N.T. dollar: (continued):

April 9, 2004	.030423
April 10, 2004	.030423
April 11, 2004	.030423
April 12, 2004	.030469
April 13, 2004	.030553
April 14, 2004	.030451
April 15, 2004	.030276
April 16, 2004	.030148
April 17, 2004	.030148
April 18, 2004	.030148
April 19, 2004	.030423
April 20, 2004	.030349
April 21, 2004	.030349
April 22, 2004	.030257
April 23, 2004	.030276
April 24, 2004	.030276
April 25, 2004	.030276
April 26, 2004	.030257
April 27, 2004	.030312
April 28, 2004	.030312
April 29, 2004	.030084
April 30, 2004	.030057

Dated: May 6, 2004

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(CBP Dec. 04–16)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR APRIL, 2004

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in CBP Decision 04-12 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): None

FOREIGN CURRENCIES—Variances from quarterly rates for April 2004 (continued):

Australia dollar:

April 23, 2004	$0.728700
April 24, 2004	.728700
April 25, 2004	.728700
April 28, 2004	.723200
April 29, 2004	.719800
April 30, 2004	.721000

Japan yen:

April 21, 2004	$0.009128
April 22, 2004	.009103
April 23, 2004	.009142
April 24, 2004	.009142
April 25, 2004	.009142
April 27, 2004	.009134
April 28, 2004	.009103
April 29, 2004	.009094
April 30, 2004	.009060

New Zealand dollar:

April 14, 2004	$0.634000
April 20, 2004	.633500
April 21, 2004	.623500
April 22, 2004	.625000
April 23, 2004	.625200
April 24, 2004	.625200
April 25, 2004	.625200
April 26, 2004	.629600
April 27, 2004	.630200
April 28, 2004	.621900
April 29, 2004	.621600
April 30, 2004	.624200

South Africa rand:

April 21, 2004	$0.148093
April 22, 2004	.145719
April 23, 2004	.148203
April 24, 2004	.148203
April 25, 2004	.148203
April 26, 2004	.147820
April 27, 2004	.149645
April 28, 2004	.144402
April 29, 2004	.144928
April 30, 2004	.144092

Dated: May 6, 2004

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

General Notices

Notice of Availability for Public Viewing of Draft Programmatic Environmental Assessment Concerning CBP's Use of the Vehicle and Cargo Inspection System (VACIS) at Various Sea and Land Ports of Entry

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that a draft Programmatic Environmental Assessment (PEA) regarding potential environmental impacts resulting from Customs and Border Protection's (CBP) deployment of the Vehicle and Cargo Inspection System (VACIS) is available for public review and comment. The VACIS system will be used at various ports of entry throughout the United States and Puerto Rico and is designed to provide a significant non-intrusive (gamma ray) inspection capability to assist CBP in its mission to prevent the entry of contraband into the United States. CBP will consider comments before issuing a final PEA and will then issue a draft Supplemental Environmental Assessment covering each local site affected to assess the environmental impact on local conditions.

DATES: The draft PEA will be available for public review for a 30-day period beginning on May 12, 2004. Written comments must be received by June 28, 2004.

ADDRESSES: Written comments may be submitted to U.S. Customs and Border Protection, Suite 1575, 1300 Pennsylvania Avenue, N.W. Washington D.C. 20229, Attn: Mr. Thomas Nelson. Copies of the draft PEA will be available for viewing at the above address. Copies may also be obtained by calling 202/344–2975 and by accessing the following Internet address (click on "Recent **Federal Register** Notices"): *www.cbp.gov/xp/cgov/toolbox/legal.*

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Nelson at 202/344–2975 or at *THOMAS.Nelson@associates.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The VACIS system

CBP's Vehicle and Cargo Inspection System (the VACIS system) provides a means for combatting the smuggling of contraband, in-

cluding implements of terrorism, into the United States. The VACIS system employs a non-intrusive inspection technique that uses low energy gamma radiation technology; it allows CBP inspectors to inspect for contraband without having to physically enter into or unload motor vehicles, containers, or other conveyances. The system is designed to augment the capabilities of the CBP inspector and enhance the efficiency and effectiveness of CBP's enforcement mission. Deployment of VACIS technology is already underway and will continue at various land and sea ports of entry throughout the United States and Puerto Rico. Given the serious nature of CBP's mission to protect the nation's borders from terrorism, it is envisioned that all ports are candidates for deployment of VACIS technology in the future.

The VACIS system consists of four configurations, described as follows:

(1) A semi-permanent version designed for inspection of motor vehicles and cargo containers at Customs ports of entry (VACIS II);

(2) A truck-mounted version designed for high-portability inspection of motor vehicles and cargo containers (Mobile VACIS);

(3) A fixed version designed specifically for installation along railroad rights of way for the inspection of railroad cars (Rail VACIS); and

(4) A Fixed Pallet Gamma Ray (FPGR) system designed for inspection of items stored on pallets and in boxes or crates (Pallet VACIS).

Public review of the draft Programmatic Environmental Assessment

Pursuant to the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality (CEQ) Regulations for Implementing the NEPA (40 CFR Parts 1500–1508), and Department of the Treasury Directive 75–02 (Department of the Treasury Environmental Quality Program), CBP has prepared a draft Programmatic Environmental Assessment (PEA) covering the deployment of the VACIS system.

This notice announces a 30-day period for public review of the draft PEA and a 45-day period for submitting comments to CBP, both periods commencing on the date this document is published in the **Federal Register.**

Evaluation of environmental impact

For all proposals of major federal actions that significantly affect the quality of the human environment, NEPA requires that the environmental implications of the proposal are to be explored. To meet this requirement, a federal agency, in some instances, must produce

an Environmental Impact Statement (EIS) that examines the environmental implications (or impacts) of a major federal action. Under § 1508.18(a) of the CEQ Regulations (40 CFR 1508.18(a)), a major federal action includes new and continuing agency activities. The VACIS system is a new and continuing CBP activity. In other instances, an agency will prepare an Environmental Assessment preliminary to production of either an EIS or a Finding of No Significant Impact (FONSI). The effect of a FONSI is that an agency will not have to produce an EIS. In still other instances, the agency need not produce either an EA or an EIS.

Under Section 8b of Treasury Directive 75–02, an EA must be prepared whenever it appears that an agency action, including the continuance of any action or program already initiated, could constitute a major action significantly affecting the quality of the human environment. An EA is a concise public statement issued by a responsible federal agency that provides sufficient evidence and analysis for determining whether to prepare either an EIS or a FONSI. Under the regulation and Section 8d of Treasury Directive 75–02, an EA must describe the proposed action (or the continuing action) and the need for it; briefly describe the environmental impacts of, and alternatives to, the proposed/continued action, including mitigating measures; list the agencies and persons consulted; and provide a brief analysis for determining whether to prepare an EIS or a FONSI.

A Programmatic Environmental Assessment (PEA) is a type of EA which, with respect to a major federal action, covers relevant environmental matters in a broad and general manner, such as a national program or policy statement. The PEA is later followed by subsequent narrower statements or analyses, such as regional program statements or site-specific statements. The draft PEA announced in this notice evaluates the potential environmental impacts resulting from deployment of the VACIS system as a nationally implemented program. Among the potential impacts evaluated are those regarding: geology and soils, hydrology and water quality, wetlands, vegetation and wildlife, air quality, noise, and radiological consequences. Also, an evaluation of alternatives to the action (deployment of the system) is included, in accordance with CEQ regulations (40 CFR 1501.2(c)).

Substantive comments received from the public and agencies during the comment period will be addressed in, and included as an Appendix to, the final PEA. Notice of issuance of the final PEA will be published in the **Federal Register**, as well as in a newspaper of general circulation in each locality where any VACIS configuration is or will be deployed.

Should CBP determine, based on the information developed and evaluation of substantive comments received, that the design, new construction, and/or operation of VACIS system configurations 1 through 4 will not have a significant impact on the environment,

CBP will prepare a FONSI. Notice of the FONSI will be published in the **Federal Register** and in a newspaper of general circulation in each locality where a VACIS configuration is/will be deployed. Should CBP determine that significant environmental impacts exist due to the project, CBP will proceed with preparation of an EIS as required under the NEPA, the CEQ Regulations (40 CFR Part 1502), and the Department of the Treasury's environmental policies and procedures.

Supplemental Environmental Assessments

After issuance of the draft PEA, review of comments received, and issuance of a final PEA, Customs will issue a draft Supplemental Environmental Assessment (also known as a Supplemental Environmental Document or SED) for each affected port. Each SED will address each local deployment site within a particular port, evaluating potential environmental impacts with respect to the particular conditions present at each site. Each draft SED will solicit public comment, and substantive comments received will be included in the Appendix to a final SED. Notice of the SED will be published in the **Federal Register** and in a local newspaper of general circulation in the particular affected locality. At that time, after receipt and evaluation of comments, CBP will determine whether to prepare a FONSI or an EIS with respect to each affected port.

PUBLIC REVIEW AND COMMENTS

The draft PEA will be available for public review for a period of 30 days beginning on the date this document is published in the **Federal Register.** The draft PEA can be reviewed at the following address: U.S. Customs and Border Protection, Suite 1575, 1300 Pennsylvania Ave., N.W. Washington D.C. 20229. Contact Mr. Thomas Nelson to make arrangements at 202/344–2975. Copies of the draft PEA may be obtained by telephone request (202/344–2975) or by accessing the following Internet address (click on "Recent **Federal Register** Notices"): *http://www.cbp.gov/xp/cgov/toolbox/legal.*

Comments regarding the draft PEA may be submitted as set forth in the "**Addresses**" section of this document.

Dated: April 9, 2004

CHARLES R. ARMSTRONG,
Acting Assistant Commissioner,
Office of Information and Technology.

[Published in the Federal Register, May 12, 2004 (69 FR 26402)]

LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities which have been issued a penalty claim under section 592 of the Tariff Act of 1930, for certain violations of the customs laws. This list is authorized to be published by section 333 of the Uruguay Round Agreements Act.

DATES: This document notifies the public of the semiannual list for the 6-month period starting March 31, 2004, and ending September 30, 2004.

FOR FURTHER INFORMATION: For information regarding any of the operational aspects, contact Gregory Olsavsky, Fines, Penalties and Forfeitures Branch, Office of Field Operations, (202) 927–3119. For information regarding any of the legal aspects, contact Willem A. Daman, Office of Chief Counsel, (202) 927–6900.

SUPPLEMENTARY INFORMATION:

Background

Section 333 of the Uruguay Round Agreements Act (URAA) (Pub. L. 103–465, 108 Stat. 4809) (signed December 8, 1994), entitled Textile Transshipments, amended part V of title IV of the Tariff Act of 1930 by creating a section 592A (19 U.S.C. 1592a), which authorizes the Secretary of the Treasury to publish in the **Federal Register**, on a semiannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the Customs territory of the United States, when these entities and/or persons have been issued a penalty claim under section 592 of the Tariff Act, for certain violations of the customs laws, provided that certain conditions are satisfied.

The violations of the customs laws referred to above are the following: (1) Using documentation, or providing documentation subsequently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that are subsequently used by the importer of record, with respect to the entry into the Customs territory of the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel

products which are falsely or fraudulently labeled as to country of origin or source; and (4) Engaging in practices which aid or abet the transshipment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on the list. If a petition or supplemental petition for relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by sections 171.2 and 171.61, Customs and Border Protection (CBP) Regulations (19 CFR 171.2, 171.61) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if allowed, is received within 60 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury (now delegated to the Secretary of Homeland Security) by the person named on the list, for the removal of its name from the list. If the Secretary finds that such person or entity has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the person or entity's name was published, the name will be removed from the list as of the next publication of the list.

REASONABLE CARE REQUIRED

Section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to their origin. Reliance solely upon information regarding the imported product from a person named on the list is clearly not the exercise of reasonable care. Thus, the textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise.

This degree of reasonable care must involve reliance on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to section 592A of the Tariff Act of 1930, an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labeling are accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

(1) Has the importer had a prior relationship with the named party?

(2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

(3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

(4) Where a claim of an origin conferring process is made in accordance with 19 CFR 102.21, has the importer ascertained that the named party actually performed the required process?

(5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

(6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

(7) What is the history of this country regarding this commodity?

(8) Have you asked questions of your supplier regarding the origin of the product?

(9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

The law authorizes a semiannual publication of the names of the foreign entities and/or persons. On October 8, 2003, CBP published a notice in the **Federal Register** (68 FR 58123) which identified two (2) entities which fell within the purview of section 592A of the Tariff Act of 1930.

592A LIST

For the period ending March 30, 2004, CBP has identified no foreign entities that fall within the purview of section 592A of the Tariff Act of 1930. The two (2) entities named on the list published on October 8, 2003, have not committed any of the enumerated violations for a period of not less than three (3) years after the initial publication of their names. Accordingly, these two (2) entities are removed and,

as no new entities are named, CBP is not listing any foreign entities on the 592A list for the period starting March 31, 2004, and ending September 30, 2004.

Dated: May 6, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, May 13, 2004 (69 FR 26615)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, May 12, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ABDOMINAL TRAINING SYSTEMS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of tariff classification of one ruling, and modification of a second ruling and revocation of treatment with respect to the tariff classification of abdominal training systems.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (Customs) is revoking one ruling and modifying a second ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of abdominal training systems. Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed actions was published in the Customs Bulletin on March 10, 2004. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 25, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, General Classification Branch, at (202) 572–8721.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), on March 10, 2004, a notice was published in the Customs Bulletin, Volume 38, Number 11, proposing to revoke New York Ruling Letter ("NY") I82223 dated June 18, 2002 and modify NY H86520, dated December 26, 2001, regarding the tariff classification of abdominal training systems. No comments were received in response to the notice.

As stated in the proposed notice, although Customs is specifically referring to NY I82223 and NY H86520, this notice covers any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625 (c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs' previous interpretation of the HTSUS. Any person involved with

substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. § 1625(c)(1), Customs is revoking NY I82223, modifying NY H86520, and revoking any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 966716 (Attachment A) and HQ 966973 (Attachment B). Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that are contrary to the determination set forth in this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: May 10, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966716
May 10, 2004
CLA–2 RR:CR:GC 966716 RSD
CATEGORY: Classification
TARRIF NO. 8543.89.96

MUNFORD PAGE HALL II, ESQ.
DORSEY & WHITNEY
1001 Pennsylvania Avenue, NW.
Suite 400 South
Washington, D.C. 20004–2533

RE: Revocation of NY I82223, Slendertone FLEX Abdominal Training System

DEAR MR. HALL:

This is in response to your letter dated September 9, 2003, on behalf of Complex Technologies, Inc. (Complex), requesting reconsideration of ruling NY I82223, dated June 18, 2002, concerning the tariff classification of the

Slendertone FLEX abdominal training system under the Harmonized Tariff Schedule of the United States ("HTSUS"). A sample of the product was submitted for our consideration.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY I 82223 as described below, was published in the Customs Bulletin on March 10, 2004. No comments were received in response to the notice.

FACTS:

The Slendertone FLEX is a battery-operated muscle stimulation apparatus which is designed to deliver electronic stimulation signals that are supposed to strengthen and tone the abdominal muscles without the wearer having to be physically active. It is composed of five basic parts: (1) the main "flex" electrical unit which generates electronic stimulation signals and houses the batteries; (2) the belt, which is made of 100% nylon binding; (3) three adhesive pads which adhere to the belt and conduct the signals from the electrical unit to the abdominal muscles; (4) a nylon travel pouch; and (5) three AAA batteries. The Slendertone FLEX is generally representative of a class of products designed for use by a healthy person where electrical muscle stimulation is applied through skin contact electrodes for the purposes of improving the tone, strength, and firmness of a focused muscles group. This class of electrically powered muscle stimulator is said to stimulate the muscles and to produce beneficial therapeutic effects by assisting in the contraction and relaxation of the focused muscles and the elimination of body fat.

In NY I82223, Customs and Border Protection (Customs) classified the Slendertone FLEX system in subheading 9506.91.00, HTSUS, which provides for articles and equipment for general physical exercise . . . other, articles and equipment for general physical exercise, gymnastics, or athletics; parts and accessories thereof, other.

ISSUE:

Whether the Slendertone FLEX system is classified in heading 9506, HTSUS, as articles and equipment for general physical exercise or in heading 8543, HTSUS, as electrical machines and apparatus having individual functions, not specified or included elsewhere in Chapter 85.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classifica-

tion of merchandise under the system. Customs believes the EN's should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
8543.89	Other:
	Other:
	Other:
8543.89.96	Other.

* * * * * * * * *

9506	Articles and equipment for general physical exercise, gymnastics athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Other:
9506.91.00	Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof.

In NY I82223 Customs determined that the Slendertone FLEX system was classified in subheading 9506.91.00, HTSUS. In NY H86520 dated December 26, 2001, Customs held that a similar product called a "Fast Abs System" was classified in subheading 9506.91.00, HTSUS. However, in NY D88729 dated March 29, 1999, Customs ruled that an electronic muscle stimulator was classified in subheading 8543.89.96, HTSUS. Customs also ruled in NY A84349 dated July 2, 1996, that the Electro-Muscular Slimmer, a battery operated device, which was supposed to produce beneficial therapeutic effects by supplying electrical pulses to muscles, was classified in subheading 8543.89.90, HTSUS. (This provision is identical to the current subheading 8543.89.96, HTSUS.) Therefore, in classifying the Slendertone FLEX, we must determine whether it is an article for general physical exercise classified in heading 9506, HTSUS, or in heading 8543, HTSUS, as an electrical machine and apparatus having individual functions, not specified or included elsewhere in chapter 85 of the HTSUS.

EN 95.06 provides that this heading covers:

(A) **Articles and equipment for general physical exercise, gymnastics or athletics,** e.g:

Trapeze bars and rings; horizontal and parallel bars; balance beams, vaulting horses; pommel horses; spring boards; climbing ropes and ladders; wall bars; Indian clubs; dumb-bells and bar-bells; medicine balls; rowing, cycling and other exercising apparatus; chest expanders; hand grips; starting blocks; hurdles; jumping stands and standards; vaulting poles; landing pit pads; javelins, discuses, throwing hammers and put-

ting shots; punch balls (speed bags) and punch bags (punching bags); boxing or wrestling rings; assault course climbing walls.

(B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03)**, e.g.:

(1) Snow-skis and other snow-ski equipment, (e.g., ski-fastenings (ski-bindings), ski brakes, ski poles).

(2) Water-skis, surfboards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

(3) Golf clubs and other golf equipment, such as golf balls, golf tees.

(4) Articles and equipment for table-tennis (ping-pong), such as tables (with or without legs), bats (paddles), balls and nets.

(5) Tennis, badminton or similar rackets (e.g., squash rackets), whether or not strung.

(6) Balls, other than golf balls and table-tennis balls, such as tennis balls, footballs, rugby balls and similar balls (including bladders and covers for such balls); water polo, basketball and similar valve type balls; cricket balls.

(7) Ice skates and roller skates, including skating boots with skates attached.

(8) Sticks and bats for hockey, cricket, lacrosse, etc.; chistera (jai alai scoops); pucks for ice hockey; curling stones.

(9) Nets for various games (tennis, badminton, volleyball, football, basketball, etc.).

(10) Fencing equipment : fencing foils, sabres and rapiers and their parts (e.g. blades, guards, hilts and buttons or stops), etc.

(11) Archery equipment, such as bows, arrows and targets.

(12) Equipment of a kind used in children's playgrounds (e.g. swings, slides, see-saws and giant strides).

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shin-guards.

(14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; skate boards; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice.
[Emphasis in original.]

In order to be classified in heading 9506, HTSUS, the articles must qualify as equipment for "general physical exercise." Such equipment includes machines such as rowing, cycling, treadmill, stair steppers, and other exercising apparatus, dumbbells, barbells, climbing ropes, medicine balls, chest expanders and grips. Consequently, we must determine whether applying electrical stimulus to the abdominal muscles constitutes "general

physical exercise." However, neither the legal notes nor the EN's provide a definition by what is meant by the phrase "articles and equipment for general physical exercise."

A tariff term that is not defined in the HTSUS or in the EN's is construed in accordance with its common and commercial meanings, which are presumed to be the same. Nippon Kogasku (USA) Inc. v. United States, 69 CCPA 89, 673 F. 2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F. 2d 1268 (1982).

The American Heritage® Dictionary of the English Language: (4th ed., 2000) defines the term "exercise" in the following manner:

> Activity that requires physical or mental exertion, especially when performed to develop or maintain fitness: *took an hour of vigorous daily exercise at a gym.* **4.** A task, problem, or other effort performed to develop or maintain fitness.

The *Cambridge Advanced Learner's Dictionary*, defines "exercise" when used as a noun as "physical activity that you do to make your body strong and healthy: Swimming is my favourite form of exercise. You really should **take** more **exercise.** I **do** stomach exercises most days" [emphasis in original.] It further defines exercise as a *verb as*: "to do physical activities to make your body strong and healthy: She exercises most evenings usually by running. A work-out in the gym will exercise all the major muscle groups."

Based on these definitions, it appears that for something to be considered exercise it must involve some physical activity. EN 95.06 follows this understanding of exercise when it lists examples of the kind of items that are considered exercise equipment classified in heading 9506, HTSUS. An individual exercising with any of the items listed in EN 95.06 would have to be engaged in some physical activity or movement. For example, exercising with Indian clubs; dumb-bells and bar-bells; medicine balls; rowing; cycling; and other exercising apparatus, etc. involves active movement on the part of an individual. Moreover, none of the items listed in EN 95.06 as articles and equipment for general physical exercise, gymnastics or athletics are electrical devices that can be used passively.

In this instance, we believe that no real physical activity is involved in using the Slendertone FLEX. It is a self-operating electronic device. The user of the Slendertone FLEX attaches the belt around his waist area and electrical impulses are transmitted to the abdominal muscles to stimulate them. The process of stimulating the abdominal muscles is done entirely by the Slendertone FLEX. Other than attaching the belt and turning it on, the user does not have to engage in any other active physical movement. Significantly, the Slendertone FLEX is marketed to people who want the results of exercising without having to engage in an exercise activity. For example, it is claimed that an individual can use the Slendertone FLEX while sitting on a couch and watching television, while the electrical stimulation signals are transmitted to the abdominal muscles.

Accordingly, because the Slendertone FLEX does not involve any active participation on the part of the user, we conclude that it is not classified in heading 9506, HTSUS, as articles and equipment for general physical exercise. The alternative proposed classification for the Slendertone FLEX is in heading 8543, HTSUS.

EN 8543 states:

> The electrical appliances and apparatus of this heading must have individual functions. The introductory provisions of Explanatory Note to heading 84.79 concerning machines and mechanical appliances having individual functions apply, *mutatis mutandis*, to the appliances and apparatus of this heading.
>
> Most of the appliances of this heading consist of an assembly of electrical goods or parts (valves, transformers, capacitors, chokes, resistors, etc.) operating wholly electrically. However, the heading also includes electrical goods incorporating mechanical features **provided** that such features are subsidiary to the electrical function of the machine or appliances.
> [Emphasis in original.]

The Slendertone FLEX is a battery-powered electrical apparatus that transmits electronic signals in order to stimulate the abdominal muscles. Thus, it has an individual function (i.e., its function can be performed distinctly from and independently of any other device) of stimulating the abdominal muscles. It is also not described elsewhere in chapter 85 of the HTSUS. Accordingly, we find that the Slendertone FLEX fits the language of heading 8543, HTSUS. Specifically, we conclude that the Slendertone Flex is classified in subheading 8543.89.96, HTSUS.

HOLDING:

The Slendertone FLEX Abdominal Training System is classified in subheading 8543.89.9695, HTSUSA, which provides for "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter parts thereof: Other machines and apparatus; Other: Other: Other: Other, Other." The general rate of duty in 2004 is 2.6% ad valorem Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov

EFFECT ON OTHER RULINGS:

NY I82223 dated June 18, 2002 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 966973
May 10, 2004
CLA–2 RR:CR:GC 966973 RSD
CATEGORY: Classification
TARRIF NO. 8543.89.96

MS. MARIA DA ROCHA
D & C CUSTOMSHOUSE BROKERAGE
701 Newark Avenue, Suite LL1
Elizabeth, New Jersey 07208

RE: Modification of NY H86520; "Fast Abs" System

DEAR MS. DA ROCHA:

On December 26, 2001, the National Commodity Specialist Division of Customs and Border Protection (Customs) issued to you, on behalf of Product of Tomorrow, a ruling, NY H86520, concerning the classification of the Fast Abs Abdominal Training system (Fast Abs). In NY H86520, Customs held that the Fast Abs system was classified in subheading 9506.91.00, Harmonized Tariff Schedule of the United States (HTSUS). In addition, NY H86520 held that the accompanying lithium batteries were classified in subheading 8506.50.00. We have reconsidered the classification of the Fast Abs system and now believe that it is incorrect. This ruling sets forth the correct classification of the Fast Abs system.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY H86520 as described below, was published in the Customs Bulletin on March 10, 2004. No comments were received in response to the notice.

FACTS:

The Fast Abs was described in NY H86520 as a battery-operated muscle stimulation apparatus which is designed to deliver electronic stimulation signals that are supposed to strengthen and tone the abdominal muscles. It includes a torso adjustable comfort zone belt, a leg and arm adjustable comfort zone belt, an advanced muscle stimulator pad with adjustable tabs, an advanced muscle stimulator unit and two lithium batteries. The system also includes a firming gel that provides the conduit from the belt's impulses to the muscle. The gel must be applied to the two contact spots on the inside of the unit, and also the skin that will be touching the contact points. The electrical muscle stimulation is applied through skin contact electrodes for the purposes of improving the tone, strength, and firmness of a focused muscles group. The Fast Abs system is an electrically powered muscle stimulator that is said to stimulate the muscles and to produce beneficial therapeutic effects by assisting in the contraction and relaxation of the focused muscles and the elimination of body fat.

In NY H86520, Customs classified the Fast Abs in subheading 9506.91.00, HTSUS, which provides for articles and equipment for general physical

exercise . . . other, articles and equipment for general physical exercise, gymnastics, or athletics; parts and accessories thereof, other.

ISSUE:

Whether the Fast Abs is classified in heading 9506, HTSUS, as articles and equipment for general physical exercise or in heading 8543, HTSUS, as electrical machines and apparatus having individual functions, not specified or included elsewhere in Chapter 85.

LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. Customs believes the EN's should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
8543.89	Other:
	Other:
	Other:
8543.89.96	Other.

* * * * * * * * *

9506	Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:
	Other:
9506.91.00	Articles and equipment for general physical exercise, gymnastics or athletics; parts and accessories thereof.

In NY H86520, Customs held that the Fast Abs system was classified in subheading 9506.91.00, HTSUS, as articles and equipment for general physical exercise. In NY I82223 dated June 18, 2002, Customs determined that a similar product called the "Slendertone FLEX System" was classified

in subheading 9506.91.00, HTSUS. However, in NY D88729, dated March 29, 1999, Customs ruled that an electronic muscle stimulator was classified in subheading 8543.89.96, HTSUS. Customs also ruled in NY A84349 dated July 2, 1996, that the Electro-Muscular Slimmer, a battery operated device, which was supposed to produce beneficial therapeutic effects by supplying electrical pulses to muscles was classified in subheading 8543.89.90, HTSUS. (This provision is identical to the current subheading 8543.89.96, HTSUS.) Therefore, in classifying the Fast Abs, we must determine whether it is an article for general physical exercise classified in heading 9506, HTSUS, or in heading 8543, HTSUS, as an electrical machine and apparatus having individual functions, not specified or included elsewhere in chapter 85 of the HTSUS.

EN 95.06 provides that this heading covers:

(A) **Articles and equipment for general physical exercise; gymnastics or athletics,** e.g.:

Trapeze bars and rings; horizontal and parallel bars; balance beams, vaulting horses; pommel horses; spring boards; climbing ropes and ladders; wall bars; Indian clubs; dumb-bells and bar-bells; medicine balls; rowing, cycling and other exercising apparatus; chest expanders; hand grips; starting blocks; hurdles; jumping stands and standards; vaulting poles; landing pit pads; javelins, discuses, throwing hammers and putting shots; punch balls (speed bags) and punch bags (punching bags); boxing or wrestling rings; assault course climbing walls.

(B) **Requisites for other sports and outdoor games (other than** toys presented in sets, or separately, of **heading 95.03)**, e.g:

(1) Snow-skis and other snow-ski equipment, (e.g., ski-fastenings (ski-bindings), ski brakes, ski poles).

(2) Water-skis, surfboards, sailboards and other water-sport equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

(3) Golf clubs and other golf equipment, such as golf balls, golf tees.

(4) Articles and equipment for table-tennis (ping-pong), such as tables (with or without legs), bats (paddles), balls and nets.

(5) Tennis, badminton or similar rackets (e.g., squash rackets), whether or not strung.

(6) Balls, other than golf balls and table-tennis balls, such as tennis balls, footballs, rugby balls and similar balls (including bladders and covers for such balls); water polo, basketball and similar valve type balls; cricket balls.

(7) Ice skates and roller skates, including skating boots with skates attached.

(8) Sticks and bats for hockey, cricket, lacrosse, etc.; chistera (jai alai scoops); pucks for ice hockey; curling stones.

(9) Nets for various games (tennis, badminton, volleyball, football, basketball, etc.).

(10) Fencing equipment : fencing foils, sabres and rapiers and their parts (e.g. blades, guards, hilts and buttons or stops), etc.

(11) Archery equipment, such as bows, arrows and targets.

(12) Equipment of a kind used in children's playgrounds (e.g. swings, slides, see-saws and giant strides).

(13) Protective equipment for sports or games, e.g., fencing masks and breast plates, elbow and knee pads, cricket pads, shinguards.

(14) Other articles and equipment, such as requisites for deck tennis, quoits or bowls; skate boards; racket presses; mallets for polo or croquet; boomerangs; ice axes; clay pigeons and clay pigeon projectors; bobsleighs (bobsleds), luges and similar non-motorised vehicles for sliding on snow or ice.
[Emphasis in original.]

In order to be classified in heading 9506, HTSUS, the articles must qualify as equipment for "general physical exercise." Such equipment includes machines such as rowing, cycling, treadmill, stair steppers, and other exercising apparatus, dumbbells, barbells, climbing ropes, medicine balls, chest expanders and grips. Consequently, we must determine whether applying electrical stimulus to the abdominal muscles constitutes "general physical exercise." However, neither the legal notes nor the EN's provide a definition by what is meant by the phrase "articles and equipment for general physical exercise."

A tariff term that is not defined in the HTSUS or in the EN's is construed in accordance with its common and commercial meanings, which are presumed to be the same. Nippon Kogasku (USA) Inc. v. United States, 69 CCPA 89, 673 F. 2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F. 2d 1268 (1982).

The *American Heritage® Dictionary of the English Language*: (4th. ed., 2000) defines the term "exercise" in the following manner:

> Activity that requires physical or mental exertion, especially when performed to develop or maintain fitness: *took an hour of vigorous daily exercise at a gym.* **4.** A task, problem, or other effort performed to develop or maintain fitness.

A second dictionary, *Cambridge Advanced Learner's Dictionary*, defines "exercise" when used as a noun as "physical activity that you do to make your body strong and healthy: Swimming is my favourite form of exercise. You really should **take** more **exercise.** I **do** stomach exercises most days." [Emphasis in original.] It further defines "exercise" as a verb as: "to do physical activities to make your body strong and healthy: She exercises most evenings usually by running. A work-out in the gym will exercise all the major muscle groups."

Based on these definitions, it appears that for something to be considered exercise it must involve some physical activity. EN 95.06 follows this understanding of exercise when it lists examples of the kind of items that are considered exercise equipment classified in heading 9506, HTSUS. An individual exercising with any of the items listed in EN 95.06 would have to be

engage in some physical activity or movement. For example, exercising with Indian clubs; dumb-bells and bar-bells; medicine balls; rowing; cycling; and other exercising apparatus, etc. involves active movement on the part of an individual. Moreover, none of the items listed in EN 95.06 as articles and equipment for general physical exercise, gymnastics or athletics are electrical devices that can be used passively.

In this instance, we believe that no real physical activity is involved in using the Fast Abs. It is a self-operating electronic device. The user of the Fast Abs attaches the belt around his waist area and electrical impulses are transmitted to the abdominal muscles to stimulate them. The process of stimulating the abdominal muscles is done entirely by the Fast Abs. Other than attaching the belt and turning it on, the user does not engage in any other active physical movement. Significantly, the Fast Abs is designed for people who want the results of exercising without having to engage in an exercise activity.

Accordingly, because the Fast Abs does not involve any active participation on the part of the user, we conclude that it is not classified in heading 9506, HTSUS, as articles and equipment for general physical exercise. The alternative proposed classification for the Fast Abs is heading 8543, HTSUS.

EN 8543 states:

> The electrical appliances and apparatus of this heading must have individual functions. The introductory provisions of Explanatory Note to heading 84.79 concerning machines and mechanical appliances having individual functions apply, *mutatis mutandis*, to the appliances and apparatus of this heading.
>
> Most of the appliances of this heading consist of an assembly of electrical goods or parts (valves, transformers, capacitors, chokes, resistors, etc.) operating wholly electrically. However, the heading also includes electrical goods incorporating mechanical features **provided** that such features are subsidiary to the electrical function of the machine or appliance.
> [Emphasis in original.]

The Fast Abs is a battery-powered electrical apparatus that transmits electronic signals in order to stimulate the abdominal muscles. Thus, it has an individual function (i.e., its function can be performed distinctly from and independently of any other device) of stimulating the abdominal muscles. It is also not described elsewhere in chapter 85 of the HTSUS. Accordingly, we find that the Fast Abs system fits within the language of heading 8543, HTSUS. Specifically, we conclude that the Fast Abs system is classified in subheading 8543.89.96, HTSUS.

HOLDING:

The Fast Abs Abdominal Training system is classified in subheading 8543.89.9695, HTSUSA which provides for: "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter parts thereof: Other machines and apparatus Other: Other: Other: Other, Other." The general rate of duty in 2004 is 2.6% ad valorem Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov

EFFECT ON OTHER RULINGS:

NY H86520 dated December 26, 2001 is modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

MODIFICATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN WALLETS OR SMALL HANDBAGS

AGENCY: Bureau of Customs & Border Protection; Department of Homeland Security.

ACTION: Notice of modification of a tariff classification ruling letter and revocation of treatment relating to the classification of certain wallets or small handbags.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs & Border Protection (CBP) is modifying one ruling letter relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain wallets or small handbags. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed modification was published in the Customs Bulletin of March 10, 2004, Vol. 38, No. 11. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 25, 2004.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Textiles Branch: (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal

obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to modify Headquarters Ruling Letter (HQ) 961942, dated October 26, 1999, was published on March 10, 2004, in Vol. 38, No. 11, of the Customs Bulletin.

As stated in the notice of proposed modification, this modification covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 961942, CBP classified a Buxton model 39 envelope-style clutch container in subheading 4202.21.6000, HTSUSA, as a handbag with outer surface of leather valued not over $20 each. Based on our further analysis of the product and the pertinent classification criteria, we find that the Buxton model 39, should be classified in subheading 4202.31.6000, HTSUS, which provides for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of leather, of composition leather or of patent leather: Other."

Pursuant to 19 U.S.C. 1625 (c)(1), CBP is modifying HQ 961942 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 966842 (Attachment). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the Customs Bulletin.

DATED: May 10, 2004

Cynthia Reese for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966842
May 10, 2004
CLA–2: RR:CR:TE: 966842 BtB
CATEGORY: Classification
TARIFF NO.: 4202.31.6000

PORT DIRTECTOR
BUREAU OF CUSTOMS AND BORDER PROTECTION
135 High Street, Room 350
Hartford, CT 06103

RE: Modification of HQ 961942; certain wallets or small handbags

DEAR PORT DIRECTOR:

This is in reference to Headquarters Ruling Letter (HQ) 961942, dated October 26, 1999, issued to you by this office regarding the classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of two envelope-style clutch containers, the Buxton model 39 ("model 39") and the Buxton model 54 ("model 54"). HQ 961942 was initiated by a Request for Internal Advice filed by Meeks & Shepard on behalf of Buxton Company. We have reviewed HQ 961942 and, with respect to model 39, have determined that the ruling is in error. Therefore, this ruling modifies HQ 961942.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of HQ 961942, as described below, was published in the *Customs Bulletin*, Volume 38, Number 11, on March 10, 2004. No comments were received during the notice and comment period that closed on April 9, 2004.

FACTS:

In HQ 961942, Customs classified model 39 in subheading 4202.21.6000, HTSUSA, as a handbag with an outer surface of leather. The model 39 is a small envelope-style clutch container with an outer surface composed of leather. Model 39 is also identified by the importer as an "Ensemble Clutch." Buxton currently imports the model 39 in several different types of cowhide leather and features the model 39 style in several of its ladies' wallets collections (the "Heiress," "Elite," and "Naturale" collections). The model 39 measures approximately 4 inches in height by 7–1/2 inches in width by 1 inch in depth when empty and in the closed position. A metal zippered closure extends along three sides of the item's central compartment. When unzipped, gussets allow the top opening of the central compartment to expand approximately 6 inches. The inside of the central compartment is divided into two smaller gusseted compartments by a zippered pouch that runs the width of the compartment. There is a single full-width slot compartment on each inside wall of the compartment. One wall also features four slots for credit cards or similar objects. The front exterior of the article consists of a flap that folds in a bifold manner and is secured in the closed position by a strap approximately 1–1/4 inches wide and 2–1/4 inches long with a metal snap fastener. When the fold-out flap is in the open position, the article measures approximately 8 inches in height. The interior of the flap contains one slot compartment extending the full width of the article and six slots sized to contain credit cards and similar objects. Inserted permanently into the full-width slot is a check book cover. Also inserted into the full-width slot are 5 transparent envelopes for photos or credit cards. The spine of the flap has an opening allowing for the storage of a thin pen. The interior side opposite the flap features one full-width slot compartment and a transparent flat slot pocket for an identification card. The rear exterior features a zippered compartment that extends across the width of the article. The zippered compartment is gusseted on one side which allows that side of the opening to expand approximately 2 inches.

ISSUE:

Whether the merchandise is properly classified in subheading 4202.31, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag, or in subheading 4202.21, as a handbag.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 4202, HTSUSA, provides for, *inter alia*, travel bags, handbags, wallets, purses and similar containers. Since the merchandise is similar to handbags and/or wallets, it is covered by the heading. Subheading 4202.21, HTSUSA, covers handbags with outer surface of leather while subheading 4202.31, HTSUSA, covers articles of a kind normally carried in the pocket or

in the handbag with outer surface of leather. Accordingly, classification in this case depends on whether or not the item is considered a handbag or an article normally carried in handbags.

The subheading EN to subheadings 4202.31, 4202.32, and 4202.39, HTSUSA, states that the subheading covers "articles of a kind normally carried in the pocket or in the handbag and include spectacle cases, note-cases (bill-folds), wallets, purses, key-cases, cigarette-cases, cigar-cases, pipe-cases and tobacco-pouches." Since subheading 4202.21, HTSUSA, explicitly covers handbags and the EN to subheading 4202.31, HTSUSA, indicates the subheading specifically covers wallets, we must decide whether model 39 is properly classified as a handbag or a wallet.

On June 21, 1995, this office published a General Notice in the Customs Bulletin, Volume 29, Number 25, entitled "The Tariff Classification of 'Wallets on a String'" that discussed the attributes of both articles of a kind normally carried in the handbag and handbags. In regard to articles of a kind normally carried in the handbag, the notice states in pertinent part:

> Such articles include wallets, which may be described as *flat* cases or containers *fitted* to hold credit/identification cards, paper currency, coins and in some instances a checkbook holder. . . .
>
> In order to be classifiable as a flatgood, the article must fit comfortably in a handbag or pocket. For example, rectangular or square cases measuring approximately 7 1/2 inches by 4 1/2 inches, or 4 3/4 inches by 4 1/2 inches, in their closed position, have been classified as flatgoods.
>
> Combining the characteristics of two flatgoods does not transform a flatgood into a handbag. Thus, the addition of a spectacle case holder to what is otherwise nothing more than a flat case with a carrying strap has been classified as a flatgood.
>
> The addition of a wrap-around zipper does not in and of itself transform a flatgood into a handbag, particularly where the zipper functions merely to secure its contents in the closed or carrying position. Specifically, the presence of a zipper which simply holds the two halves of a wallet or similar container together, so that cards, currency or other articles in fitted compartments do not fall out, does not transform the case into a handbag.

With respect to handbags, the notice states:

> A hand bag functions as a carry-all container for various small personal effects:
>
> A container which is not *fitted* to hold articles such as credit/identification cards, paper currency, coins or a checkbook holder is classifiable as a handbag. Therefore, a clutch bag or an evening bag measuring, for example, 7 1/2 inches by 4 1/2 inches, shall be classified as a handbag.
>
> The determinative feature of a handbag is its ability to hold several objects not associated with a wallet. A bag which may accommodate articles such as a hairbrush, cosmetics, keys and other loose personal effects shall be classified as a handbag, even if it also incorporates the features of a flat case fitted to hold the items set forth above.
>
> The presence of gusseted and/or zippered compartments will be taken into consideration in a determination of whether a case has generic car-

rying capacity. The presence of a wrap-around zipper may be an indication that the container is a carry-all if the zipper creates an inner space suitable for carrying three dimensional items.

As stated in HQ 953774, dated August 2, 1993, the classification of envelope-style clutch containers proceeds on a case-by-case basis. In prior rulings involving similarly-sized envelope-style clutch containers, we have considered a container's shape and size, as well as the types, shapes and sizes of its compartments, fittings and openings, to determine if the item is classifiable as a wallet or as a handbag. Generally, if an envelope-style clutch container can fit comfortably into a pocket or handbag, is fitted to hold items normally associated with a wallet such as currency, photos, identification or credit cards, and checkbooks, and is not designed to hold 3-dimensional items not associated with the capacities of a wallet or flatgood, the container would be classifiable as an article normally carried in the pocket or in the handbag.

We have ruled the presence of wrap-around zipper closures (*See* HQ 957632, dated March 24, 1995), snap closures (*See* HQ 959185, dated February 10, 1997), spectacle cases (*See* HQ 957632), belt loops (*See* HQ 959185), shoulder straps (*See* HQ 956017, dated June 10, 1994), and check book covers (*See* HQ 953774), do not preclude an envelope-style clutch container from being classified as a wallet. However, the addition of such features are steps in the direction of an article being classified as a handbag, as the article begins to take the character of a carry-all container. As stated in the June 21, 1995 General Notice and repeated in numerous rulings, the determinative feature of a handbag is its ability to hold several objects not associated with a wallet.

Model 39's central compartment top opening expands to approximately 6 inches when unzipped and fully opened. Because of its gussets, it can, when open, accommodate 3-dimensional personal effects not normally associated with a wallet. However, when the compartment is zipped in the closed position, the compartment is less than one inch thick. Its ability to accommodate personal effects other than small, narrow items such as coins or flat items such as paper currency or credit cards when closed is very limited. The gussets mainly permit the user to expand the compartment to view, insert, and/or remove contents, but they do not appear designed to organize or store 3-dimensional personal effects when the compartment is closed. In fact, the gussets are not functional when the item's central compartment is zipped. Although a few small 3-dimensional items can be stuffed into the compartment and the zipper forced shut, the result is a container with a distended and awkward appearance. Prolonged storage of small 3-dimensional items could disfigure the container's sleek leather outer surface. Additionally, most of model 39's other compartments (those under the fold out flap, the interior side compartment opposite the fold out flap, and the rear exterior compartment) can only hold flat items such as paper currency or credit cards. The spine can hold a thin pen, likely for use with a checkbook that the item is designed to hold.

We find that model 39 is classified as an article normally carried in the pocket or in the handbag. Model 39's compartments are fitted to hold items normally associated with a wallet, such as currency, photos, identification or credit cards, and a checkbook. These compartments cannot easily accommodate small 3-dimensional personal effects when the container is in the closed position. Although model 39 has a wrap-around zipper along the three sides

of its central compartment, we find that it functions mainly to secure its contents in the closed position and does not create an inner space suitable for carrying three-dimensional objects. Similarly, while the gussets expand the central compartment to view, insert, and/or remove contents, they do not function to permit the storage of 3-dimensional personal effects when the compartment is zipped.

HOLDING:

HQ 961942, dated October 26, 1999, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Model 39 is properly classified in subheading 4202.31.6000, HTSUSA, as an article normally carried in the pocket or in the handbag with outer surface of leather. The general column one rate of duty is 8%.

Cynthia Reese for MYLES B. HARMON,
Director,
Commercial Ruling Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 04–28

HENG NGAI JEWELRY, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Consol. Court No.: 98–10–03019
PUBLIC VERSION

[Plaintiff's Motion for Summary Judgment is denied; and Defendant's Cross-Motion for Summary Judgment is denied.]

Decided: March 24, 2004

Law Offices of Elon A. Pollack, PC (*Elon A. Pollack, Kayla Owens*), for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice, *Saul Davis*, Trial Attorney; *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel, for Defendant.

OPINION

WALLACH, Judge:

I
Preliminary Statement

On February 25, 2004, the court heard oral argument on cross-motions for summary judgment by Plaintiff, Heng Ngai Jewelry, Inc. ("HNJI"), and Defendant, United States Customs Service[1] ("Customs"). Plaintiff's Motion for Summary Adjudication of Issues challenges Customs' decision to appraise certain shipments of jewelry imported by HNJI using computed value rather that transaction value. Plaintiff claims that Customs erroneously characterized

[1] Effective March 1, 2003 the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003).

transfers from HNJI's related supplier, Heng Ngai, Ltd. ("HNHK"), as commission transfers rather than bonafide sales. Defendant argues that the relationship between the parties affected the terms of the transfer, and thus, the transaction value was artificially low. Defendant also claims that Plaintiff failed to use reasonable care in providing Customs with the information it required to properly determine value properly, which necessitated the use of computed value. On these bases, the government cross-moves for summary judgment. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994). For the following reasons, the Court denies both motions.

II
Background

HNHK is a Hong Kong based company that manufactures gold jewelry. HNHK imported jewelry into the United States through its salesman, Chi Man Tang, in 1993. In a 1993 interview with a Customs import specialist, Mr. Tang stated that the jewelry was being imported for possible sale at trade shows. Later that year HNJI, a United States subsidiary of HNHK, was incorporated. Plaintiff's Response To Defendant's Separate Statement Of Material Facts To Which There Are No Genuine Issues To Be Tried ("Plaintiff's Response") at 7, Par. 19. HNJI soon began importing jewelry, including 10kt and 14kt gold rings and bracelets, from HNHK.

At issue are eight entries made through the Port of San Francisco, California, and thirty-five entries made through the Port of Anchorage, Alaska, from January 1995 until December 1996.[2] Each port requested specific financial information from the Plaintiff and the Plaintiff responded. Customs ultimately rejected the invoice price, and appraised the jewelry using computed value, claiming that the transfers from HNHK to HNJI did not constitute bona fide sales. Customs determined that the transactions were on consignment, referred to as a memo transfers in the jewelry industry.[3]

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[2] Port of San Francisco entries: 1107697–1, 1107687–2, 1107820–9, 1107907–4, 1107438–0, 1108116–1, 1107525–4, 1107487–7; Port of Anchorage entries: 110–9490035–1, 110–9493075–4, 110–9493083–8, 110–9493117–7, 110–9495729–4, 110–9514315–9, 110–9515278–8, 110–959661–1, 110–9468265–2, 110–9489981–9, 110–9523457–8, 110–9526891–8, 110–1755333–8, 110–1751451–2, 110–1754619–1, 110–176855–7, 110–17668161–8, 110–1770260–4, 110–1772066–3, 110–1771933–5, 110–1772093–7, 110–1772860–9, 110–1775885–3, 110–1745487–5, 110–149206–5, 110–1755251–2, 110–1755665–3, 110–1761725–7, 110–1757414–4, 110–1757528–1, 110–1757411–0, 110–1759996–8, 110–1764895–5, 110–1789522–6, 110–1760073–3; Plaintiff's Opposition To Defendant's Cross-Motion For Partial Summary Judgment And Reply On Its Own Motion For Partial Summary Judgment ("Plaintiff's Opposition and Reply").

[3] In the jewelry industry there is a distinction between what the trade refers to as an "asset" transfer and a "memo" transfer. An "asset" transfer represents a sale where ownership is transferred to the recipient. A "memo" transfer is one in which ownership is retained by the grantor, and payment is not required by the recipient unless and until the goods are

Customs at the Port of San Francisco issued its first request for additional information, Customs form CF 28, on August 29, 1995. Customs sought a value breakdown of any four items on the invoices showing all costs which made up the invoice price for a particular entry by HNJI. *See* Defendant's Opposition To Plaintiff's Motion For Partial Summary Judgment And Cross-Motion For Partial Summary Judgment ("Defendant's Motion"), Appendix M, Jeffries Exhibit. HNJI responded to this request. Customs sought more complete information and on November 28, 1995, issued a second request. In this request, Customs stated that HNJI had provided information that showed costs only for material and labor and did not provide overhead and general expenses amounts. Thus, Customs requested more specific costs for this entry, and for financial statements for Heng Ngai in Hong Kong for the last three complete fiscal years to support its [percentage] profit margin claim. In the written request, Customs stated that if the specific financial statements were not available, HNJI was requested to submit year-end adjusted income statements for the last three years. *Id.* at 3. The Plaintiff responded to this request.

On January 29, 1996, Customs at the Port of Anchorage also issued a CF 28 request for additional information covering entries made there. Plaintiff responded by providing the same information it had submitted to Customs at the Port of San Francisco. On March 23, 1996, Customs at the Port of Anchorage issued a second request for additional information similar to its second request at San Francisco. Plaintiff did not respond to this request.

When Customs ruled on the matters, it rejected transaction value on all of Plaintiff's entries in favor of computed value, added an additional [percent] to the invoice value, and liquidated accordingly. Customs Headquarters Ruling Letter No. 546673 (March 17, 1998), ("HQ546673"); *See* Plaintiff's Motion For Summary Adjudication of Issues, Appendix. Plaintiff timely protested Customs' decision. On April 10, 1997, while Plaintiff's protests were pending, Plaintiff submitted additional information in the form of invoices to unrelated purchasers. Plaintiff claimed that the invoices established that unrelated U.S. buyers paid similar prices for jewelry from HNHK. This submission did not include the corresponding entry numbers for the merchandise. Customs then requested the entry numbers as well as more detailed descriptions of the merchandise. Plaintiff provided additional information in the form of airway bills for the above invoices, but stated that it was unable to produce the corresponding entry numbers because it was not the importer for these entries.

On March 17, 1998, Customs issued a Headquarters Ruling, HQ546673, which denied Plaintiff's further protest of the Port of San Francisco's use of computed value. On December 14, 1998, and Janu-

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sold to a third party. See, Plaintiff's Response, Par.24 citing the Connolly Deposition.

ary 18, 1999, the Port of Anchorage denied protests on 35 entries made there based on the reasoning in HQ546673.

Some of the imported jewelry which is the subject of this case was subsequently returned and exported back to China. From September 1, 1995, through June 2, 1998, HNJI claimed drawback[4] refunds pursuant to 19 U.S.C. § 1313(j)(1) (1994) for duties paid on jewelry that was shipped back out of the United States and returned to HNHK. The returned jewelry was valued at approximately [a certain amount on money]. These drawback entries included refunds of the invoice prices, but failed to include the additional [percent] over unit price for profit.

III
Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56; *Celotex Corp. v. Cartlett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265, 273 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). The nonmoving party is "entitled to have both the evidence viewed in the light most favorable to it and all doubts resolved in its favor." *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991). To oppose a summary judgment motion successfully a party must raise a genuine issue of material fact. This entails more than a mere denial or conclusory statements. A party must produce evidence which sets forth specific facts showing that there is a genuine issue for trial. *See American Motorist Insurance Company v. United States*, 5 CIT 33 (1983).

VI
Arguments

Plaintiff contends that there is no genuine issue of fact with regard to Customs use of computed value because it believed the merchandise was not *sold* for exportation to the United States. Furthermore, Plaintiff claims there is no genuine issue of material fact that HNHK did in fact sell the jewelry to the Plaintiff, and Plaintiff's relationship with HNHK did not affect the price paid as reflected in

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[4] Pursuant to 19 C.F.R. § 191.2 (1994), "'Drawback' means a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty, tax, or fee was assessed or collected."

the invoice price. Plaintiff asserts that it used reasonable care in responding to Customs requests for information and that Customs ignored the information available to it in appraising the merchandise on the basis of computed value.

Defendant cross-moves for summary judgment claiming that Customs properly fixed the final appraisement of the merchandise by using computed value based upon the limited facts provided by HNJI during the entry process and administrative review. Defendant claims that all the documentation made available to date only confirms and reinforces Customs' finding. Defendant further argues that given its failure to exercise reasonable care in responding to Customs' requests for information and documentation, Plaintiff should be estopped from presenting to this court any such information which was available but not previously provided to Customs.

V
Discussion

A
There is a Genuine Issue of Material Fact as to Whether Customs Properly Valued Plaintiff's Merchandise

The statutory language is specific with regard to related party transactions. Pursuant to 19 U.S.C. § 1500 (1999), "[t]he Customs Service shall . . . (a) fix the final appraisement of merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power. . . ." Under 19 U.S.C. § 1401a (1999), Customs appraises imported merchandise according to a hierarchy. The first basis of appraisement is transaction value, that is, the price actually paid or payable.[5] *See* 19 U.S.C. § 1401a(1); 19 C.F.R. § 152.101 (1994). Related party transactions, such as the ones at issue here, are addressed in § 1401a(b)(2) and are acceptable only if the price is not affected by the relationship between the parties, or if the transaction value closely approximates that of identical merchandise sold to unrelated buyers or other relevant test values.[6] Thus, Customs may not disregard transaction

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[5] 19 U.S.C. § 1401a provides that

Value

(a) Generally

(1) Except as otherwise specifically provided for in this chapter, imported merchandise shall be appraised, for the purposes of this chapter, on the basis of the following:

(A) The transaction value provided for under (b) of this section.

(b) Transaction value of the imported merchandise

(1) The Transaction value of the imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States

[6] Related party transactions are addressed in 19 U.S.C. § 1401a(b)(2)(B):

value solely because the buyer and the seller are related. Customs is required to examine the circumstances of the sale. *See* 19 C.F.R. § 152.103(j)(2). If Customs rejects transaction value, the importer has the opportunity to demonstrate the circumstances of the sale to show that transaction value is appropriate.[7] If, upon such analysis, Customs still deems transaction value inappropriate, the statutory hierarchy continues, sequentially, to look at transaction value of identical merchandise, transaction value of similar merchandise, deductive value, and then computed value. 19 U.S.C. § 1401a.

Customs closely scrutinizes related party transactions when making a value analysis. This court in *La Perla Fashions, Inc., v. United States*, 22 CIT 393, 395 (1998), explained that

> [w]hen the related importer resells to U.S. customers, a three-tiered transaction is created. The net profits made by the exporter on the subject merchandise are unaffected in a three-tiered transaction since the related importer resells to the open market, returning to the exporter any loss of revenue from the reduced-price sale to the importer. This ability and opportunity for import duty evasion motivated Congress to enact protective legislation and to direct Customs to closely scrutinize related party transfer pricing.

Id. at 701.

Importers have an interest in reducing invoice prices to lower import

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The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates—

(i) the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or

(ii) the deductive value or computed value for identical merchandise or similar merchandise;

but only if each value referred to in clause (i) or (ii) that is used for comparison relates to merchandise that was exported to the United States at or about the some time as the imported merchandise.

[7] Under 19 C.F.R. § 152.103(l)(1), regarding related buyers and sellers and the validity of transaction, "[t]he district director shall not disregard a transaction value solely because the buyer and seller are related. There will be related person transactions in which validation of the transaction value, using the procedures contained in § 152.103(j)(2), may not be necessary." Additionally, the interpretive note to this regulation states that

> [i]f Customs does have doubts about the acceptability of the price and is unable to accept the transaction value without further inquiry, the importer will be given the opportunity to supply such further detailed information as may be necessary to enable Customs to examine the circumstances of the sale. In this contest, Customs will examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at in order to determine whether the relationship influenced the price.

duties, and unlike buyers on the open market, related parties also have the ability and opportunity to do so. *Id.*

In this case, Customs decided that the evidence suggested the jewelry was not sold for export to the United States; therefore, it rejected transaction value. Customs stated that "[t]here was some evidence that the subject merchandise was only entered for possible sale in trade shows and would be returned to the foreign supplier if not sold." HQ 546673. After finding that no bona fide sale had occurred, Customs addressed subsequent valuations in the statutory hierarchy and claimed it was unable to find sufficient information for any value above computed value. "Customs also found insufficient information regarding the transaction value of identical or similar merchandise and no information was furnished pertaining to deductive value." *Id.*

In deciding these Motions, the court first considers whether there is a genuine issue of material fact as to whether the transactions constituted bona fide sales. The court then addresses the question of whether the Plaintiff exercised reasonable care in providing Customs with the information it required to accurately appraise the merchandise. The court also examines whether Customs followed the statutory requirements in calculating computed value. Finally, it considers whether the Plaintiff should be estopped from presenting evidence before the court that was available, but not presented administratively.

B
Further Findings of Fact are Required to Determine if Invoice Value Represents the Price Actually Paid or Payable

Plaintiff contends that there is no genuine issue with regard to the fact that HNHK sold the jewelry to the Plaintiff, and that the invoice price reflects the price actually paid or payable. Plaintiff claims that Customs rejected transaction value based upon the 1993 interview with Chi Man Tang. Plaintiff argues that Customs' reliance on this interview was inappropriate in valuing the imports because plaintiff was not even incorporated until several months after this interview. Plaintiff argues that it never received any of its jewelry on a consignment basis. To establish this Plaintiff offers the declaration of Christine Lam[8] and the deposition of Joanne Connolly[9]. Both state that transactions were in fact sales.

Ms. Lam states that "HNJ Limited [HNHK] sold all of the merchandise to the Plaintiff on an "F.O.B." [Free on Board] basis and,

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[8] Ms. Christine Lam was the Financial Controller of the Heng Ngai Group during the relevant time of importation. The Heng Ngai Group includes both HNHK and HNJI.

[9] Ms. Joanne Connolly was the President of HNJI in the United States during the relevant time of importation.

Heng Ngai Jewelry, Inc.[HNJI] paid the invoice amount in due course as reflected on each payment voucher and corresponding withdraw slip." Lam Declaration. Ms. Connolly states that even samples provided by HNHK were sold to HNJI. Plaintiff's Motion at 7, 8. Ms. Lam's declaration is accompanied by financial records including invoices, most of which include an indication of an additional [percentage (identifying party omitted)] profit above the unit price, bank withdrawal slips, and payment vouchers. Plaintiff claims that the [percent] addition for [(identifying party omitted)] profit is significant because it demonstrates that HNJI paid a price which represented a reasonable profit to HNHK as it would with an unrelated party would.

Defendant claims that there is no question Customs correctly valued Plaintiff's imports, and that Plaintiff's evidence presented so far only reinforces Customs' assessment. Defendant states that Plaintiff failed to provide any basis for believing that the consigned importing from HNHK did not continue under HNJI "with a changing of the guard from Chi Man Tang to HNJI." Defendant's Motion at 42.[10] Defendant refutes Plaintiff's claim that the price was legitimate by pointing to the Connolly Deposition for the premise that the unit prices on the invoices reflected the actual cost of making the merchandise, and did not include profit to the manufacturer. Defendant's Separate Statement of Material Facts To Which There Are No Genuine Issues To Be Tried ("Defendant's Statement of Facts") at 3. Presumably in sales to unrelated buyers, profit and expenses would already be included in the invoice price. Defendant claims that the circumstances of the transfers were more indicative of commission or "Memo" transfers than outright sales, and points to the Lam Deposition in which Ms. Lam explains that HNJI paid HNHK only after sales to third party buyers.

Defendant disputes Plaintiff's claim that the business records attached to the Lam Declaration are sufficient to establish bona fide sales. Specifically, Defendant notes that the invoices contain a space called "Terms" and that space is blank on each of the invoices provided. Furthermore, although eight out of forty three invoices contained the shipping term "FOB", this was ambiguous, as it is unclear whether the terms were free on board Hong Kong, or free on board at the point of delivery. Defendant's Motion at 10. Defendant says that "FOBHK" would have been more appropriate if the terms had been as the plaintiff claims.

Defendant disputes Plaintiff's claim that the financial records establish a bona fide sale. Defendant provides the deposition of Steven

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[10] Although at oral argument Defendant's counsel conceded that it is currently unaware of any legal relationship between Mr. Tang and HNJI.

A. Mack.[11] Mr. Mack testified that allocation of payments from HNJI to HNHK are not verifiable because it appears that HNJI either paid more or less than the invoice amounts. *Id.* at 43. Defendant claims that a determination of price paid or payable would require financial records not provided. Defendant further asserts that, unlike HNHK's sales to unrelated buyers[12], most payments by HNJI to HNHK for the merchandise in question occurred [a certain time period] after the merchandise was shipped. Defendant's Statement of Facts at 1. Defendant also points out that because payments were made so long after shipment of the goods, it is impossible to match individual payment amount to the invoices provided. Therefore the allocations of payments are unverifiable and "lend themselves to manipulation." Defendant's Motion at 45. Defendant also disputes Plaintiff's claimed [percent] profit. Defendant reasons that if the invoice amount represents a unit price equal to the manufacturing costs plus an additional [percent] profit, costs usually associated with a FOB/point of shipment price, such as general expenses, manufacturing overhead, freight to point of shipment, and other expenses one would expect are absent. *Id.*

Defendant goes on to argue that the Plaintiff's claim that the goods were "sold" is further undermined by the fact that HNJI claimed drawback for returned merchandise for upwards of [a certain amount of money] from the time period at issue. *Id.* at 6. In Defendant's Supplementation of Defendant's Cross-Motion for Summary Judgment ("Defendant's Supplement"), Defendant argues that not only is such a large amount of returned merchandise suspiciously unlike what one would expect from an unrelated buyer, but that upon closer examination of the drawback documents filed with Customs the [percent] "added [(identifying party omitted)] profit" is omitted from the drawback claim. Thus, HNJI only claimed drawback on the unit price of the jewelry. Defendant's Supplement at 8. Plaintiff says this omission was not noticed until Defendant pointed it out in their filings in this litigation. Defendant claims that it is unlikely that an unrelated buyer in a bona fide sale would overlook a shortfall of approximately [a certain amount of money]. Defendant argues that the credibility of the Plaintiff's claims are further brought into question by the Lam and Varon[13] declarations stating that approximately [a certain percent] drawback is not unusual when in fact the drawback entries here represented [a certain per-

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[11] Assistant Field Director for the U.S. Customs Service/ Bureau of Customs and Border Patrol and Auditor for the Regulatory Audit Division of the United States Customs Service at the time of importation.

[12] In Christine Lam's deposition she states that sales to unrelated buyers usually require payment within thirty days of the invoice date. Lam Deposition, p.80.

[13] Samuel Varon is a Certified Public Accountant hired by HNJI to analyze HNJI's financial records for this litigation.

cent] of the imported merchandise or about [a certain number of] times what unrelated purchasers return. Defendant's Response To Plaintiff's Second Separate Statement of Material Facts To Which There Are No Genuine Issues To Be Tried and Reply To Plaintiff's Opposition To Defendant's Cross-Motion For Summary Judgment ("Defendant's Response and Reply") at 7 and 15.

In reply, Plaintiff claims to have provided Defendant with ample proof of payment, cost breakdown, accounts receivable, accounts payable, financial statements and tax returns amounting to thousands of pages to support its claim that the transactions were bona fide sales. Plaintiff's Opposition and Reply at 27. Plaintiff claims that the unit price on the invoices provided represent more than the manufacturing costs and points to both the Lo and Lam depositions. *Id.* at 21. Plaintiff argues that the invoices and paperwork provided are sufficient to establish payment. Any reading of the invoices which finds them to be inconsistent with payments, says plaintiff, are either misread, the result of inadvertent omissions by plaintiff, or a misunderstanding of handwriting. *Id.* at 25 (citing Lam Supplemental Declaration). Furthermore, although payments covered more that one invoice, invoices which are not involved are not included. Also, any omission of the [percent] for profit only occurred on the invoices that pre-dated Customs notice of action, Customs form CF 29, of July 14, 1995, in which Plaintiff was instructed to include the [percent] for general expense and profit. *Id.* at 27.

Plaintiff goes on to argue that the fact that it was a new company explains much of the financial arrangements between HNJI and HNHK. Plaintiff claims that payments were not tied to resale in the United States. Plaintiff's Second Separate Statement Of Material Facts To Which There Are No Genuine Issues To Be Tried ("Plaintiff's Second Statement of Material Facts") at para. 50 (as corrected at Oral Argument). Initially there was a large inventory transferred from HNHK to HNJI, and the obligation to pay attached at the time of shipment. Plaintiff's Response at 2. HNJI had to sell inventory to U.S. customers to have the money to pay HNHK. In his deposition Mr. Varon states that such open payment terms are not unusual for related party transactions. Plaintiff's Opposition and Reply at 19.

Plaintiff disputes the significance of the amount of returned merchandise represented by the drawback entries. Plaintiff's argument is supported by the Varon deposition, which states that in his opinion the amount of drawback is neither unusual, nor indicative of memo transactions. Plaintiff argues that [a certain amount of money] represented a small percentage of the total sales of HNHK to HNJI, and [a certain percentage of] returns are not unusual. *Id.* at 24. Citing the Lam Supplemental Declaration. As for the fact that the [percentage] for profit was absent from the drawback claims, plaintiff cites the declaration of Scott McCurdy (The Customs Broker who completed the relevant drawback entries) in which he states

that he accidentally filled out the forms incorrectly. *Id.* Moreover, at oral argument Plaintiff argued that the oversight is not material to this case in that it only demonstrates that Plaintiff overpaid the government.

The question presented is whether there is a genuine issue as to a material fact. Whether or not the exchange between HNHK and HNJI is a bona fide sale is a material fact because, under 19 U.S.C. § 1401 the use of transaction value is only appropriate if there is a bona fide sale. Therefore, the outcome of this litigation will be determined, in part, on whether or not there was a sale. Under summary judgment standards, the matter will have to be litigated.

The question of whether there is a genuine dispute is determined by looking at the evidence and arguments presented to determine if a reasonable trier of fact could find for the non-moving party. *Anderson et al. v. Liberty Lobby, Inc., et al.*, 477 U.S. 242, 248–249, 255, 106 S. Ct. 2505, 91 L. Ed 202 (1986). For the cross-motions before the court, this entails addressing each of the individual claims raised in the light most favorable to the party disputing that particular claim. This is not a weighing of the evidence. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249.

Central to whether the transfers were bona fide sales is the significance of unit price as reflected in HNHK's invoices. Plaintiffs claim these prices reflect manufacturing costs, expenses, freight, and profit. Defendants claims they represent only manufacturing costs. The evidence presented thus far falls short of resolving the issue. The cost breakdowns submitted in response to Customs request for information, and the depositions of HNJI's employees present varied and contradictory interpretations of invoice price. *See* Defendant's Motion, Appendix M; Deposition of Joanne Connolly at 101–103; Deposition of Eric Lo at 63–64; Deposition of Christine Lam at 67–71. Further evidence is required to resolve the significance of unit price.

Much of the evidence supporting other claims with respect to the terms of the transfers is brought into question by similar evidence from the opposing party. For example, pointing to HNJI's tax returns, Plaintiff claims the returns establish ownership of the goods, saying consigned goods would not have been included as assets, Plaintiff's Opposition and Reply at 20, while defendant claims the same tax returns establish that there was no sale, Defendant's Response and Reply at 8. Similarly, with respect to the absence of payment terms on certain invoices, the parties respective experts draw opposite conclusions. Mr. Varon states that open terms are not unusual in related party transactions, while Mr. Mack claims that even in such transactions, he has never seen an absence of payment

terms, and that in his experience, even generous terms are spelled out. *Id.* at 15.

Viewing the facts presented in the light most favorable to the opposing party, Plaintiff's motion is denied because it has not eliminated the possibility that the goods were transferred on consignment, and Defendant's cross motion is denied because it has not eliminated the possibility that the goods were not transferred in a bona fide sale. In the absence of a determination as to whether the transfers represented a bona fide purchase, the parties contentions regarding other factors in determining the legitimacy of transaction value, i.e. the effect of the relationship of the parties on the terms of sale, as well methods of valuation in the hierarchy, cannot be resolved.

C
Further Findings of Fact Are Necessary to Determine if Customs Properly Fixed the Final Appraisement of the Merchandise by Using Computed Value Based on the Information Provided by HNJI During the Entry and Administrative Review

The court now examines how Customs applied the statutes and regulations and whether the plaintiff should be estopped from presenting information not previously provided the court. Defendant has not establish conclusively that Plaintiff failed to exercise reasonable care in providing Customs with adequate information to properly value the merchandise. A genuine issue also remains as to the propriety of Customs' computed value calculation. Finally, the court finds estoppel, as urged by Defendant, to be inappropriate.

i
Further Findings of Fact are Necessary to Determine if Plaintiff Used Reasonable Care in Providing Customs with Information Necessary to Appraise the Merchandise Using Values Other Than Computed Value

Defendant claims that under *La Perla*, Plaintiff's failure to provide detailed verifiable records allowed Customs to reject "any claim that the alleged prices between HNJI and HNHK were not affected by the relationship." Defendant's Motion at 18. According to the Defendant, such failure prevented Customs from substantiating transaction value or calculating computed value properly. Customs, the Defendant argues, appraised the merchandise according to the requirements of § 1500 given that "HNJI failed to provide proper records to substantiate its claimed transaction values and to permit a proper computed value calculation." *Id.* Pursuant to 19 U.S.C. § 1484 (1999), an importer is required, as part of the shared respon-

sibility between Customs and the trade community,[14] to use reasonable care in providing Customs with information necessary for the proper assessment of duties.[15]

Defendant claims that Plaintiff did not provide the information necessary to determine whether there was in fact a sale, if the relationship between the parties affected the price, or if there were acceptable test values that closely approximated the price paid. Defendant further argues that the facts necessary to ascertain HNHK's general expenses and profit for the class or kind of merchandise were missing. Defendant says that Customs used the information it had to appraise the merchandise based on the requirements of § 1500 to estimate the value by all reasonable ways and means in its power.[16] Defendant argues that since Customs found insufficient information regarding the transaction value of identical or similar merchandise, and no information was furnished pertaining to deductive value, it properly utilized computed value.

Plaintiff argues that it did respond to Customs' requests and that Customs failed to use the information available to properly appraise the imported merchandise. When responding to Customs' request, Plaintiff provided financial information in the form of invoices from HNHK to unrelated U.S. buyers. Customs then asked for the corresponding entry numbers. Plaintiff provided additional information; however, it was unable to produce the corresponding entry numbers, claiming that such information was not within its control because it was not the importer. Financial information was provided for the entire HNHK group with the exception of HNJI because the Plaintiff

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[14] The legislative history for the North American Free Trade Agreement Implementation Act states that

> In the view of the Committee, it is essential that this "shared responsibility" assure that, at a minimum, "reasonable care" is used in discharging those activities for which the importer has responsibility. These include, but are not limited to: furnishing of information sufficient to allow Customs to fix the final classification and appraisal of merchandise; taking measures that will lead to and assure the preparation of accurate information to permit proper valuation of merchandise.

P.L. 103–182, 107 Stat. 2057 (1993).

[15] 19 U.S.C. § 1484 provides that:

> Except as provided is sections 490, 498, 552 and 336(j), one of the parties qualifying as "importer of record" under paragraph (2)(B), . . . shall, using reasonable care—
>
> * * *
>
> (B) complete the entry by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or . . . such other information as is necessary to enable the Customs Service to—
>
> (i) properly assess duties on the merchandise. . . .

[16] Pursuant to 19 U.S.C. § 1500, "[t]he Customs Service shall . . . (a) fix the final appraisement of merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power, any statement of cost or costs of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding."

concluded that such information from an unrelated operation would be irrelevant in calculating the general expenses, costs, overhead and profit of the *manufacturer.* Plaintiff's Opposition and Reply at 10 (emphasis added). Plaintiff also claims that there was a communications breakdown between HNJI and its import broker, the importer of record, the Fritz companies.

Plaintiff says that after an initial request for information by Customs at the Port of Anchorage was forwarded by the Fritz companies to Plaintiff, Plaintiff informed Customs that it was to communicate directly with Plaintiff because the Fritz companies were not agents of the Plaintiff, but rather nominal consignees. Plaintiff further claims that Customs disregarded this request. This, Plaintiff claims, lead to a breakdown in communication, which is why Plaintiff did not respond to this second request for information. *Id.* at 11. Plaintiff goes on to argue that Customs never made a serious attempt to gather information necessary to appraise the merchandise properly and that it in turn relied on information from its 1993 interview with Chi Man Tang. *Id.* Plaintiff asserts that Customs never asked whether the goods were sold or consigned, nor did it ask for proof of payment for any of the entries. Plaintiff's Statement of Material Facts at 2, par. 10 (citing the Jefferies, Johnstone, and Riter depositions). Plaintiff argues that Customs had predetermined that it would reject transaction value and only asked for supporting documentation after it had decided to use computed value. Plaintiff's Opposition and Reply at 14.

Simply put, the parties have raised genuine issues of material fact as to whether Plaintiff used reasonable care in providing Customs with the information necessary to properly value its merchandise. Considering the Defendant's claim in the light most favorable to the Plaintiff, given that Plaintiff did respond to Defendant's requests and provided what it considered to be adequate information, the possibility that Plaintiff used reasonable care in executing its shared responsibility cannot be eliminated. Thus, Defendant did not meet its burden of establishing entitlement to summary judgment on the issue of reasonable care.

ii
Further Evidence is Required to Determine Whether the Defendant Properly Followed the Statutory Requirements in Calculating Computed Value

Assuming, arguendo, that Customs did correctly reject transaction value in favor of computed value, the question as to whether Customs followed the statutory requirements in calculating computed value remains. Customs is required to consider the elements set out in 19 C.F.R. § 152.106 when calculating computed value. The regulation provides that:

The Computed value of imported merchandise is the sum of:

(1) The cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise;

(2) An amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;

(3) Any assist, if its value is not included under paragraph (a)(1) or (2) of this section; and

(4) The packing costs.

In calculating computed value, Customs divided the manufacturer's total general expenses and gross profit by its sales for the latest year provided to establish its profit margin. *See* HQ 546673. Customs added an additional [percent] to the invoice value and liquidated accordingly. It claims that this was the only option given the limited information available. Plaintiff claims that this calculation is erroneous because the profit margin for the entire Heng Ngai Group includes a wide variety of entirely unrelated businesses such as real estate. As Defendant acknowledges, while Customs may rely upon "all reasonable ways and means" and the "best evidence available" to ascertain value, it may not disregard the necessary statutory elements in doing so. *Jack Bryan, Inc. v. United States*, 80 Cust. Ct. 169 173 (1978); *Brown, Alcantar & Brown Inc. v. United States*, 69 Cust. Ct. 249 (1972).

Defendant says that it did not disregard the statutory elements of computed value. Defendant claims to have estimated value based on the information HNJI had provided. Defendant further argues that because the "language and legislative history of § 1484 were not enacted until well after decisions such as *Jack Bryan*," these decisions do not reflect Congress's intent with regard to the "shared responsibility" between importers and Customs. Defendant's Motion at 19.

Plaintiff raises the possibility that Customs' calculation of computed value did not make sufficient use of the information available. While Defendant refutes this argument, its evidence falls short of eliminating it altogether. For this reason a genuine issue of material fact remains as to Customs' calculation of computed value.

iii
Defendant Failed to Adequately Support a Claim for Evidentiary Estoppel Before Trial

Defendant argues that plaintiff should be estopped from presenting new evidence in court that was not presented to Customs in the administrative review process. The gravamen of Defendant's argument lies in drawing an analogy between Customs' estimation of du-

ties based on limited information provided by an importer and the Internal Revenue Service's estimation of taxes for those with insufficient records of income. Defendant's Motion at 21. The appellate courts for several circuits have upheld IRS estimations where taxpayers do not have records of income.[17] As in the tax arena, importers have the privilege of self-assessing the value of their imported merchandise and the burden of maintaining records relating to claims made regarding the imported merchandise. *Id.* at 22 (citing 19 U.S.C. § 1484 (1999) and 9 U.S.C. § 1509 (1999)). Furthermore, just as the IRS must estimate the taxpayer's income when not provided adequate information under 26 U.S.C. § 446(b) (1999), Customs has the right to estimate the value of imported merchandise at liquidation under 19 U.S.C. § 1500.[18]

Defendant concedes that 28 U.S.C. § 2638 (1994) permits the Court to consider any new grounds raised by an importer, for the first time in Court, as long as the grounds related to the same administrative decision and merchandise encompassed by the administrative protest. Defendant's Motion at 28. However, Defendant argues that to permit Plaintiff to offer new evidence at this juncture would be to reward Plaintiff's misconduct in failing to produce the evidence earlier. Defendant's Motion at 33. Such a holding, says defendant, would provide incentive not to comply with what defendant describes as the congressional intent of § 1484, and penalties under § 1484 are insufficient. *Id.* Defendant claims that without precluding the introduction of evidence previously available but not provided administratively, it will be confronted with new evidence after the ability to investigate has grown stale. *Id.* at 32.

Plaintiff further argues that under both statutory and case law, it should not now be estopped from presenting new evidence at trial. Plaintiff's Opposition and Reply at 12. In *E.I. DuPont de Nemours & Co. v. United States*, 123 F. Supp. 2d 637 (2000), the government also argued that an importer should be estopped from presenting new evidence to the court that it had not presented at the administrative level. The *DuPont* court rejected this argument as limiting the court's "express statutory authority to develop a record," in that it conflicts with 28 U.S.C. § 2640(a)(1) (1994) which states that its determination in reviewing the "denial of a protest pursuant to 28 U.S.C. § 1581(a) is based on the record the court makes." *Id.* at 640.

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[17] *The Bubble Room, Inc. v. United States*, 159 F.3d 553, 557, 566 (Fed. Cir. 1998), *reh'g and suggestion for reh'g in banc den.* Jan. 14, 1999; *Gerardo v. C.I.R.*, 552 F.2d 549 (3rd Cir. 1977); *Carson v. United States*, 560 F.2d 693 (5th Cir. 1977); *Long v. C.I.R.*, 757 F.2d 957 (8th Cir. 1985); *Bradford v. C.I.R.*, 796 F.2d 303 (9th Cir. 1986); *Erickson v. C.I.R.*, 937 F.2d 1548 (10th Cir. 1991).

[18] Customs is directed to "fix the final appraisement of merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power, any staement of cost or costs of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding. . . ." 19 U.S.C. § 1500(a).

The *DuPont* court also rejected a similar argument that permitting the introduction of evidence not previously provided would allow for violations of the reasonable care requirement without penalty. The court points out that "Customs has authority to initiate civil penalty proceedings against an importer for fraud, gross negligence and negligence. *See* 19 U.S.C. § 1592 (1999)." *Id.* at 641. The Defendant argues that the opportunity to obtain such relief is a lengthy alternative which should not preclude their position on estoppel.

Defendant urges the extension of the reasonable care requirement to preclude evidence available to but not previously presented by Plaintiff. Given the clear statutory language and the reasoning in *DuPont*, the court declines to find that estoppel applies in this case. This ruling, however, is without prejudice to Defendant's ability to seek to exclude individual items of evidence at trial on any appropriate evidentiary basis.

VI
Conclusion

Summary judgment is appropriate only when there is no genuine issue of material fact. Evidence and arguments presented by the parties raise questions of material fact as to whether the transactions at issue constituted bona fide sales, Plaintiff used reasonable care in providing information to Customs for the proper appraisal of the merchandise, and Customs followed the statutory requirements in calculating computed value. Because these questions of material fact exist, summary judgment is inappropriate.

For the foregoing reasons, Plaintiff's Motion For Summary Adjudication of Issues and Defendant's Cross-Motion For Partial Summary Judgment are denied.

Slip Op. 04–47

CRAWFISH PROCESSORS ALLIANCE; LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY; BOB ODOM, COMMISSIONER, PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND HONTEX ENTERPRISES, INC., d/b/a LOUISIANA PACKING COMPANY; QINGDAO RIRONG FOODSTUFF CO., LTD. AND YANCHENG HAITENG AQUATIC PRODUCTS & FOODS CO., LTD; BO ASIA, INC., GRAND NOVA INTERNATIONAL, INC., PACIFIC COAST FISHERIES CORP., FUJIAN PELAGIC FISHERY GROUP CO., QINGDAO ZHENGRI SEAFOOD CO., LTD. AND YANGCHENG YAOU SEAFOOD CO., DEFENDANT-INTERVENORS AND PLAINTIFFS.

Consol. Court No. 02–00376

This consolidated action concerns the motion of plaintiffs, Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner (collectively "CPA") and plaintiffs and defendant-intervenors, Hontex Enterprises, Inc., d/b/a Louisiana Packing Company ("Hontex"), Qingdao Rirong Foodstuff Co., Ltd. ("Qingdao"), Yancheng Haiteng Aquatic Products & Foods Co., Ltd. ("Yancheng"), Bo Asia, Inc. ("Bo Asia"), Grand Nova International, Inc. ("Grand Nova"), Pacific Coast Fisheries Corp. ("Pacific Coast"), Fujian Pelagic Fishery Group Co. ("Fujian") and Yangcheng Yaou Seafood Co. ("Yaou") (collectively "Plaintiffs/Defendant-Intervenors"), pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final results entitled *Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Recission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 19,546 (Apr. 22, 2002).

Specifically, Plaintiffs/Defendant-Intervenors contend that Commerce's determination to select Australia as the appropriate surrogate country for valuation of whole live crawfish was not supported by substantial evidence or in accordance with law. CPA argues that Commerce's determination to use the list prices from a single Australian company was not the "best available information" of prices for crawfish used in the production of tail meat exported by Chinese crawfish companies. Additionally, CPA complains that Commerce improperly rejected information submitted regarding a possible affiliation between Qingdao and another Chinese crawfish exporter. Qingdao and Yancheng contend that Commerce erred in its application of a dry-to-wet weight conversion ratio to the crawfish shells by-product factor calculation. Hontex complains that Commerce improperly rejected certain Hontex filings as untimely submitted new factual information, and that Commerce erred in assigning a single rate to Ningbo Nanlian ("Nanlian") and Jiangsu Hilong International Trading Company, Ltd. ("Jiangsu"). Bo Asia, Grand Nova, Pacific Coast, Fujian, Yaou and Hontex also complain that Commerce's failure to issue a timely final determination renders the *Final Results* void *ab initio*. Bo Asia, Grand Nova, Pacific Coast, Fujian and Yaou contend that: (1) Commerce failed to find that Fujian and Pacific Coast were "affiliated" parties; (2) Commerce erred in assigning Yaou an "adverse facts available" margin; and (3) the statutory provisions for the disbursement of collected antidumping duties to domestic interested parties require Commerce to change its procedures during the administrative review at issue.

Held: CPA and Plaitiff/Defendant-Intervenors' 56.2 motion is granted in part and denied in part. Case remanded to Commerce with instructions to (1) include the submissions made by Hontex on March 19, 2002, and March 20, 2002, as part of the administrative record and explain what bearing, if any, these submissions have on Com-

merce's final determination; and (2) sufficiently articulate (a) why its collapsing methodology for non-market economy exporters is a permissible interpretation of the antidumping duty statute; and (b) why its findings warranted the collapsing of Jiangsu and Nanlian.

Date: May 6, 2004

Adduci, Mastriani & Schaumberg, L.L.P. (*Will E. Leonard* and *John C. Steinberger*) for Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner, plaintiffs.

Coudert Brothers LLP (*John M. Gurley* and *Matthew J. McConkey*) for Hontex Enterprises, Inc., d/b/a Louisiana Packing Company, plaintiff and defendant-intervenor.

White & Case (*William J. Clinton, Adams C. Lee* and *Jonathan Seiger*) for Qingdao Rirong Foodstuff Co., Ltd. and Yancheng Haiteng Aquatic Products & Foods Co., Ltd., plaintiffs and defendant- intervenors.

Garvey Schubert Barer (*William E. Perry, Lizabeth R. Levinson* and *John C. Kalitka*) for Bo Asia, Inc., Grand Nova International, Inc., Pacific Coast Fisheries Corp., Fujian Pelagic Fishery Group Co., Qingdao Zhengri Seafood Co., Ltd. and Yangcheng Yaou Seafood Co., plaintiffs and defendant-intervenors.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Arthur D. Sidney*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: This consolidated action concerns the motion of plaintiffs, Crawfish Processors Alliance, Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner (collectively "CPA") and plaintiffs and defendant-intervenors, Hontex Enterprises, Inc., d/b/a Louisiana Packing Company ("Hontex"), Qingdao Rirong Foodstuff Co., Ltd. ("Qingdao"), Yancheng Haiteng Aquatic Products & Foods Co., Ltd. ("Yancheng"), Bo Asia, Inc. ("Bo Asia"), Grand Nova International, Inc. ("Grand Nova"), Pacific Coast Fisheries Corp. ("Pacific Coast"), Fujian Pelagic Fishery Group Co. ("Fujian") and Yangcheng Yaou Seafood Co. ("Yaou") (collectively "Plaintiffs/Defendant-Intervenors"),[1] pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final results entitled *Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Recission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* ("*Final Results*"), 67 Fed. Reg. 19,546 (Apr. 22, 2002).

Specifically, Plaintiffs/Defendant-Intervenors contend that Commerce's determination to select Australia as the appropriate surro-

[1] The Court notes that while Qingdao Zhengri Seafood Co., Ltd. ("Qingdao Zhengri") filed a complaint against the United States, it did not file with the Court a motion pursuant to USCIT R. 56.2 for judgment upon the agency record.

gate country for valuation of whole live crawfish was not supported by substantial evidence or in accordance with law. CPA argues that Commerce's determination to use the list prices from a single Australian company was not the "best available information" of prices for crawfish used in the production of tail meat exported by Chinese crawfish companies. Additionally, CPA complains that Commerce improperly rejected information submitted regarding a possible affiliation between Qingdao and another Chinese crawfish exporter. Qingdao and Yancheng contend that Commerce erred in its application of a dry-to-wet weight conversion ratio to the crawfish shells by-product factor calculation. Hontex complains that Commerce improperly rejected certain Hontex filings as untimely submitted new factual information, and that Commerce erred in assigning a single rate to Ningbo Nanlian ("Nanlian") and Jiangsu Hilong International Trading Company, Ltd. ("Jiangsu"). Bo Asia, Grand Nova, Pacific Coast, Fujian, Yaou and Hontex also complain that Commerce's failure to issue a timely final determination renders the *Final Results* void *ab initio*. Bo Asia, Grand Nova, Pacific Coast, Fujian and Yaou contend that: (1) Commerce failed to find that Fujian and Pacific Coast were "affiliated" parties; (2) Commerce erred in assigning Yaou an "adverse facts available" margin; and (3) the statutory provisions for the disbursement of collected antidumping duties to domestic interested parties require Commerce to change its procedures during the administrative review at issue.

BACKGROUND

The administrative review at issue involves the period of review ("POR") covering September 1, 1999, through August 31, 2000.[2] *See Final Results*, 67 Fed. Reg. at 19,546. Commerce published the preliminary results of the subject review on October 12, 2001. *See Notice of Preliminary Results of Antidumping Duty Administrative Review and Preliminary Partial Recision of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat From the People's Republic of China* ("*Preliminary Results*"), 66 Fed. Reg. 52,100.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (2000) and 28 U.S.C. § 1581(c) (2000).

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[2] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(I) (1994); *see NTN Bearing Corp. of Am. v. United States*, 24 CIT 385, 389–90, 104 F. Supp. 2d 110, 115–16 (2000) (detailing Court's standard of review in antidumping proceedings).

DISCUSSION

I. Commerce Properly Determined to Select Australia as the Surrogate Country for Valuation of Whole Live Freshwater Crawfish

A. Contentions of the Parties

1. Plaintiff/Defendant-Intervenors' Contentions

Plaintiff/Defendant-Intervenors generally contend that Commerce erred in rejecting Spain and choosing Australia as the source of surrogate values for live crawfish. *See* Pls. Qingdao Yancheng R. 56.2 Mot. J. Upon Agency R. ("Qingdao & Yancheng's Mem.") at 8–25; Br. Supp. Pls.' Mot. J. Agency R. ("Bo Asia's Br.") at 27–30; Mem. Supp. Mot. J. Upon Agency R. ("Hontex's Mem.") at 4–15. Bo Asia, Grand Nova, Fujian and Yaou (collectively "Bo Asia et al.") add that Commerce ignored the best available information on the record by choosing Australian data rather than data from Mexico, a country with an economy more comparable to China. *See* Bo Asia's Br. at 29–30.

Specifically, Qingdao, Yancheng and Hontex first assert that Commerce abandoned its prior practice of using Spanish import data to establish the surrogate value for live crawfish. *See* Qingdao & Yancheng's Mem. at 9–10; Hontex's Mem. at 10. Qingdao and Yancheng further contend that Commerce must meet a high evidentiary standard and thoroughly explain its reasons for departing from its prior practice. *See* Qingdao & Yancheng's Mem. at 15. Commerce's rejection of Spanish data was based upon the observation that import data used in previous reviews indicated a drastic decline in the amount of imports of live crawfish into Spain from Portugal. See Qingdao & Yancheng's Mem. at 10. Commerce failed to articulate its reasons for discontinuing the use of Spanish import data and why it rejected all forms of data on Spanish prices for live crawfish. *See id.* at 10–11. Moreover, Qingdao and Yancheng maintain that Commerce should have considered other sources of Spanish data that could be substituted for the Spanish import data used in previous reviews. *See id.* at 11.

Second, Qingdao, Yancheng and Hontex take issue with Commerce's reasons for rejecting alternative Spanish crawfish data submitted by interested parties. *See id.* at 15–17; Hontex's Mem. at 6–9.

Contrary to Commerce's determination, the data entitled *Estudio Sobre el Impacto Económico del Sector de Congrejo de Rio en Andalucia* (the "*Spanish Study*") was an official government report sanctioned by the regional government of Andalusia, which "approved the study, developed and issued the questionnaire that was used to collect data used in the study, and financed the printing of both the questionnaire and the eventual study." Qingdao & Yancheng's Mem. at 16; *see also* Hontex's Mem. at 6. Hontex asserts that "[n]owhere in the record is it apparent that the [*Spanish Study*] was not a 'government product at all.' " Hontex's Mem. at 7. In addition, Commerce has traditionally relied on similar broad, industry-wide averages and estimates as surrogate values. *See* Qingdao & Yancheng's Mem. at 17–19. The data contained in the *Spanish Study* demonstrates that Spain was an important market for live crawfish during the POR, "so that prices of that input could reasonably be used as surrogate values in this proceeding." *Id.* at 17. Accordingly, Qingdao, Yancheng and Hontex complain that Commerce improperly determined that the *Spanish Study* was unreliable and rejected the use of Spanish prices to establish the surrogate value for live crawfish.

Third, Qingdao and Yancheng argue that Commerce "erred in failing to ensure that the [*Spanish Study*] really was unacceptable as a source of surrogate data before moving on to use the Australian yabby surrogate value data." *Id.* at 25. Qingdao and Yancheng further complain that Commerce failed to collect the same type of information regarding crawfish and the crawfish tail meat industries during its trip to Spain and Australia. *See id.* at 21–25. Commerce's analysts during their respective trips "met and interviewed the same types of government officials and industry representatives in both countries, [yet they] failed to ask them the same, or even comparable, questions." *Id.* at 22. Commerce, for example, failed to collect and report the price of live crawfish in Spain while it did so during its Australia trip. *See id.* Qingdao & Yancheng deduce that Commerce's divergent approach to the *Spanish Study* and data from Australia "demonstrates clearly that [Commerce's] decision to reject the [*Spanish Study*], and hence Spain as a source for price data on which to establish a surrogate value for live crawfish, was arbitrary and not supported by substantial evidence." *Id.* at 24.

Commerce's regulations require it to use prices or costs of factors of production ("FOP") in a market economy that is comparable in economic development with the non-market economy ("NME") country under investigation. *See* Hontex's Mem. at 10 (citing 19 C.F.R. § 351.408(b) (1999)). Here, record evidence indicates that Spain and not Australia is closer to China's economic development and, therefore, the better source of surrogate value data for live crawfish. *See* Hontex's Mem. at 10–11. Hontex asserts that "[s]ince Spain's *per capita* income is closer to China than that of Australia, if the surro-

gate data is equally valid, then the statutory preference is for Spain." Hontex's Mem. at 11 (emphasis in original). The growing season, species and genus of crawfish harvested by Spain is identical to that in China, while such is not the case for Australia. *See id.* at 14; Qingdao & Yancheng's Mem. at 24–25. While Commerce "prefers to use surrogate data for *identical* merchandise," here Commerce used the price for Australian yabbies, which is not identical merchandise. Hontex's Mem. at 14 (emphasis in original). In Australia, the "'yabby' is harvested and sold predominantly in live form, and is not typically processed into tail meat . . . [while in Spain,] the majority of live crawfish are used for processing." Qingdao & Yancheng's Mem. at 13. While Australian processors use only the smallest or deformed yabbies, Spanish processors, like those in China, use all sizes of crawfish to produce tail meat. *See id.* at 13–14. Consequently, Spain's prices for live crawfish are more similar to those in China and, therefore, are the "best available" surrogate values.

Qingdao and Yancheng concede that prices of live crawfish in Spain were lower than prices in Australia. *See id.* at 12–13. They argue, however, that prices in Spain were not aberrational in comparison to world market prices. *See id.* The prices Commerce used "were likely artificially high and inappropriate for use to establish surrogate values for live crawfish input into crawfish tail meat production." *Id.* at 13. Hontex argues that Commerce improperly relied on Australian prices for live crawfish "that were based on a relatively insignificant quantity." Hontex's Mem. at 12. While Spain produced 2,721 metric tons of live crawfish during the POR, Australia only produced 419 metric tons of live crawfish during the same period. *See id.* In addition, Commerce "relied upon a *single* price from a *single* producer in Australia," whereas the *Spanish Study* "accounts for a *whole* industry, not a single supplier, and covers the *whole* POR, not a specific moment in time during the POR." *Id.* at 13 (emphasis in original). Consequently, Spanish data is superior to the Australian data used by Commerce because it "is more representative of what the price of whole live crawfish would be in China if that price was set up by market price." *Id.* In subsequent reviews, Commerce has returned to using Spanish data to establish surrogate values for live crawfish, which shows that the use of Australian data was wrong. *See id.* at 14–15.

Bo Asia et al. alternatively argue that the record supports the use of prices from Mexico to establish the surrogate value for live crawfish. *See* Bo Asia's Br. at 27–30. There is evidence establishing the existence of a commercial crawfish industry in the Mexican State of Veracruz, and the exportation of frozen crawfish tail meat to the United States. *See id.* at 27–28. Bo Asia et al. maintain that, based on gross national income ("GNI") per capita data obtained from the World Bank, Mexico is closer to China than Australia in terms of economic development. *See id.* at 29. Consequently, if Spanish data is

not used to establish surrogate values, then Mexican data for live crawfish is the "best available information." *See id.* at 29–30.

2. Commerce's Contentions

Commerce responds that its decision to use Australia as the surrogate country to value the crawfish input is supported by record evidence and in accordance with law. *See* Def.'s Mem. Opp. Pls.' Mots. J. Upon Agency R. ("Commerce's Mem.") at 14–27. Commerce is only required, to the extent possible, to select a surrogate country with economic development comparable to that of China. *See id.* at 14. While Australia's economic development was substantially higher than China's, Commerce used Australia because it was the only market economy country with significant production of comparable merchandise. *See id.* at 16–17. Commerce's regulations "anticipate the possibility of using market economy countries that are not at a level of economic development comparable to China." *Id.* at 16. Commerce opines that Australia's annual crawfish production of approximately 290 metric tons was significant for its purposes. *See id.* at 19. In considering whether Australian yabbies are comparable to Chinese crawfish, Commerce determined that yabbies are generally larger. *See id.* at 17. Commerce found, however, that Australian yabbies weighing 30 to 40 grams or blemished yabbies were comparable to Chinese crawfish in size and constituted the "best available information." *See id.* at 26.

Commerce asserts that it considered record evidence regarding Spanish and Mexican price data, but found that Australian data was the "best available information." *See id.* at 17. Commerce maintains that the *Spanish Study* was not a government report because it was paid for by the owner of a crawfish processor, which competes with other Andulician crawfish processors. *See id.* at 18. Furthermore, the *Spanish Study* did not contain complete price data and was based on estimates rather than actual transactions. *See id.* If interested parties "wanted Commerce to consider 'alternative' Spanish prices, it was incumbent upon them to provide price data to Commerce." *Id.* at 20. Based on these findings, Commerce determined that the Spanish data was not reliable and, therefore, not the "best available information." *See id.* at 19.

With regard to Mexico, Commerce determined that it was not a significant producer of comparable merchandise. *See id.* at 20. Record evidence did not establish that Mexico had a commercial freshwater crawfish industry. *See id.* at 21. Commerce found that statistics gathered by the local Mexican government "are not limited to crawfish, are not collected regularly, and are not representative because these statistics are limited to only two months." *Id.* at 22. Consequently, Commerce contends that it properly determined that Mexican crawfish price data was also not the "best available information."

B. Analysis

The Court's role in the case at bar is not to evaluate whether the information Commerce used was the best available, but rather whether Commerce's choice of information is reasonable.[3] *See China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1229, 1236 (2003). Commerce's discretion in choosing its information is limited by the statute's ultimate goal "to construct the product's normal value as it would have been if the NME country were a market economy country." *Rhodia Inc. v. United States*, 25 CIT ___ , ___ , 185 F. Supp. 2d 1343, 1351 (2001). While Commerce enjoys broad discretion in determining what constitutes the best information available to calculate NV, Commerce may not act arbitrarily in reaching its decision. If Commerce's determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce. Here, Commerce's determination of what constitutes the best available information is based on sound reasoning. For the reasons set forth below, the Court finds that Commerce's determinations—that the Spanish data was unreliable and that Mexico was not a significant producer of comparable merchandise—were reasonable.

In conducting an administrative review, Commerce determines the antidumping duty margin by taking the difference between the normal value ("NV") and the United States price of the merchandise. When merchandise is produced in an NME country, such as the People's Republic of China ("PRC"), there is a presumption that exports are under the control of the state. Section 1677b(c) of Title 19 of the United States Code provides that, "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1) (1994). The statute, however, does not define the phrase "best available information," it only provides that, "[Commerce], in valuing factors of production . . . shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). To determine the comparability of a market economy country's economic development with that of an NME country, Commerce "will place primary emphasis on *per capita* GDP as the mea-

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[3] The statute's silence regarding the definition of "best available information" provides Commerce with "broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Timken Co. v. United States*, 25 CIT ___ , ___ , 166 F. Supp. 2d 608, 616 (2001). Furthermore, in evaluating the data, the statute does not require Commerce to follow any single approach. *See Luoyang Bearing Factory v. United States*, 26 CIT ___ , ___ , 240 F. Supp. 2d 1268, 1284 (2002).

sure of economic comparability." 19 C.F.R. § 351.408(b) (1999). Nonetheless, Commerce is given broad discretion "to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994).

The antidumping duty statute authorizes, but does not mandate that Commerce use surrogate countries to estimate the value of the FOP. In legislative history, Congress provided Commerce with guidance by stating that, "in valuing such [FOP], Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." H.R. Conf. Rep. No. 100–576, at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623 ("*House Report*"). The *House Report* further states that, "the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time." H.R. Conf. Rep. No. 100–576, at 590–91, reprinted in 1988 U.S.C.C.A.N. at 1623–24.

In the case at bar, Plaintiff/Defendant-Intervenors take issue with Commerce's reasoning for rejecting certain record evidence concerning price data from Spain and Mexico. Commerce responds that it has discretion to determine the "best available information," and that it reasonably concluded that Australian yabby prices for the valuation of Chinese crawfish was such information. Section 1677b(c)(1) of Title 19 of the United States Code directs Commerce to use "the best available information" concerning the values for FOP from a market economy when calculating the NV for a product exported from an NME country, such as the PRC. *See China Nat'l*, 27 CIT at ___ , 264 F. Supp. 2d at 1234. The Court of Appeals for the Federal Circuit ("CAFC") has reasoned that "there is much in the statute [19 U.S.C. § 1677b(c)(1) and (4)] that supports the notion that it is Commerce's duty to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko*, 43 F.3d at 1443; *see also Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

In previous reviews, Commerce used data on imports into Spain from Portugal to value live crawfish input for tail meat. See Commerce's Mem. at 5. For the third administrative review, however, Commerce determined that Spanish imports from Portugal had significantly decreased and the diminished volume was no longer sufficient to constitute a basis for the calculation of surrogate value. *See id.* Commerce undertook a search for other market economy country data that would reflect a more substantial volume of trade. *See id.* Commerce subsequently selected Australia as the surrogate country to value freshwater crawfish input. *See id.* In doing so, Commerce compared Australian price data to Spanish and Mexican price data

on the record and determined that only the Australian data was appropriate. Commerce stated that "the *Spanish Study* does not consist of a discrete set of data on live crawfish prices, regularly maintained and published by government authorities." *See Issues & Decision Mem.*[4] at 23.

Qingdao, Yancheng and Hontex contend that Commerce's reasoning for finding the *Spanish Study* unreliable is flawed because it is "an official government report" and Commerce has "traditionally accepted this same type of broad-based, industry-wide source of surrogate value information." Qingdao & Yancheng Mem. at 16–17; *see* Hontex's Mem. at 6–8. Commerce's conclusion regarding the unreliability of the *Spanish Study*, however, does not rest solely on wether it was published by government authorities or if it contains broad-based, industry-wide data. Rather, Commerce noted that "the price data in the *Spanish Study* were averages calculated . . . upon numerous assumptions and possibly incomplete and/or inaccurate and/or roughly estimated data." *Issues & Decision Mem.* at 25. Commerce reasonably concluded that the *Spanish Study* does not indicate how many companies provided information for the allocations it contained and whether the responses to questions regarding seasonal averages of purchase prices or volumes were complete. *See id.*

Commerce notes that the consultant who compiled the *Spanish Study* explained to Commerce "that some of the [crawfish] companies to which he sent the questionnaire provided full responses, and some provided only partial responses—varying in degree of completeness."[5] *Id.* at 24. Commerce reasonably concluded that it could not determine that there is a "substantial likelihood that the price information contained within [the *Spanish Study*] is comprised of averages and/or is representative of a wide, or otherwise appropriate, range of prices from within the POR, and not potentially distorted by the influence and/or special interests of any private sector parties." *Issues & Decision Mem.* at 25–26. Commerce reasonably determined that the price information contained in the *Spanish Study* reflected unchecked, and possibly incomplete, estimates rather than

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[4] The full title of this document is *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review and Final Partial Recission of Antidumping Duty Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China: September 1, 1999 through August 31, 2000*, compiled as an appendix to the *Final Results*, 65 Fed. Reg. at 19,546 (generally accessible on the internet at http://ia.ita.doc.gov/frn/summary/prc/02-9802-1.txt). The Court, in the interest of clarity, will refer to this document as *Issues & Decision Mem.* and match pagination to the printed documents provided by defendant. *See e.g.*, Def.'s Pub. Ex. at Tab 25.

[5] The questionnaire sent by the consultant who compiled the *Spanish Study* "contained [*inter alia*] requests for a variety of general information, including the range of products produced by each [crawfish] company, the percentage of total sales attributable to crawfish, employment numbers for crawfish production, [and,] the percentage of production sold to domestic and/or export markets." *See Issues & Decision Mem.* at 23–24.

actual prices.[6] Commerce is charged with determining antidumping duty margins as accurately as possible. *See Lasko*, 43 F.3d at 1443; *see also Shakeproof*, 268 F.3d at 1382. If Commerce had used the data contained within the *Spanish Study*, Commerce would have contravened its duty to determine the antidumping duty as accurately as possible.[7]

Commerce also reasonably determined that record evidence did not establish the existence of a commercial crawfish industry in Mexico. *See Issues & Decision Mem.* at 36–39. The record indicates, and Bo Asia et al. concede, that complete official statistics regarding the existence of a crawfish industry in Mexico are unavailable.[8] *See* Bo Asia's Br. at 11. The record contains certain evidence, such as a letter from a local Mexican government official, that indicates the existence of a commercial crawfish industry in Veracruz. *See Issues & Decision Mem.* at 36. In June of 2001, Commerce sent a team of analysts to Mexico to research freshwater crawfish and determine whether Mexico has a crawfish industry. *See id.* at 32. Information gathered from interviews with government and industry officials directly contradicted record evidence regarding the existence of a crawfish industry in Mexico. *See id.* at 38. Furthermore, Commerce determined that even if the record evidence "provided dispositive evidence that there was a commercial freshwater crawfish tail meat processing industry, this documentation would not validate the use of flawed statistics for whole, live freshwater crawfish prices." *Issues & Decision Mem.* at 39. The Court finds that Commerce's determination that Mexican price data on the record was inappropriate for use as a surrogate value for whole, live crawfish was reasonable.

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[6] Qingdao and Yancheng contend that Commerce's rejection of the data in the *Spanish Study* is inconsistent with Commerce's "established preference to base surrogate values on industry-wide averages rather than on data on individual transactions from individual producers." *See* Qingdao & Yancheng's Mem. at 18. In the case at bar, however, Commerce principally took issue with the completeness and accuracy of the data and not with whether the data was compiled by a private individual or by a governmental entity. *See Issues & Decision Mem.* at 25–26.

[7] Plaintiffs/Defendant-Intervenors point out that Spain and not Australia's economic development based on GNI per capita is more comparable to China's economic development. Nonetheless, for surrogate value purposes, Commerce is charged with more than simply choosing a country with comparable economic development to the NME country involved in the review. Commerce's ultimate goal is to choose surrogate values that will allow a valuation that reflects the products normal value as if the PRC were a market economy country. *See China Nat'l*, 27 CIT at _____, 264 F. Supp. 2d at 1236. The Court notes that while Australian yabbies are not identical to Chinese crawfish used to produce crawfish tail meat, Commerce reasonably determined that the values it chose would aide Commerce in achieving its ultimate goal.

[8] Bo Asia et al. also concede that "there clearly is disagreement among [Mexican government] officials regarding the existence of freshwater crawfish tail meat in the Mexican State of Veracruz. . . ." Bo Asia's Br. at 11.

II. Commerce Properly Used Data from an Australian Company to Calculate NV

A. Contention of the Parties

1. CPA's Contentions

CPA complains that the surrogate value chosen by Commerce for whole live freshwater crawfish violated 19 U.S.C. § 1677b(c) (1994) because it was not "the best available information" on the record. *See* Br. CPA Supp. Mot. J. Agency R. ("CPA's Mem.") at 5–15. Specifically, CPA argues that Commerce improperly rejected data published by the Australian Bureau of Agriculture and Resource Economics ("ABARE") concerning the quantity and value of live crawfish produced and sold in Australia during the POR. *See id.* at 6. Instead of using the ABARE statistics, Commerce relied on the price list for small and aesthetically blemished crawfish of a single Australian company, Mulataga Party Ltd. ("Mulataga"). *See id.* Commerce concluded that Chinese tail meat was produced from crawfish with live weights of 40 grams or less. *See id.* CPA contends that this decision was improper because larger crawfish are used in China and Australia to produce tail meat. *See id.* at 6–7. Additionally, there is no record evidence indicating that Chinese tail meat is exclusively produced from aesthetically blemished crawfish. *See id.* at 6–7. The record demonstrates, however, that Chinese processors use crawfish with live weights ranging from 40 grams to 70 grams. *See id.* at 6. Commerce reached its conclusion without addressing specific information on the record, in the Table of Equivalents, indicating that crawfish with live weights more than 40 grams were used to produce Chinese tail meat. *Id.* at 9. Consequently, CPA complains that "Commerce has failed to provide a reasonable basis for concluding that blemished Australian yabbies of 30–40 grams are the 'best available' surrogate for Chinese crawfish generally, including the crawfish of 41–76 grams known to be used by Chinese processors." *Id.* at 12.

CPA further contends that Commerce improperly limited the factor value to prices for "seconds," whole crawfish that are aesthetically blemished. *See id.* CPA asserts that there is no record evidence that indicates that Chinese crawfish processors only use "seconds" to produce tail meat. *See id.* at 13. Aesthetically unblemished crawfish can command a higher price than "seconds" since "an unblemished crawfish is more attractive to purchasers who would use it whole." *Id.* Accordingly, CPA contends that "the surrogate value should reflect the fact that, if the Chinese approach of using all sizes of crawfish for tail meat were practiced in a market economy country, the average value of live crawfish inputs would be higher than otherwise." *Id.* CPA complains that Commerce's reasons for rejecting the ABARE statistics does not support its preference for Mulataga's list prices. *See id.* at 15. The methodological soundness and reliability of the ABARE's statistics were not challenged during the relevant ad-

ministrative proceeding. *See id.* The statistics collected by the ABARE cover 245–306 metric tons of annual production and are collected and published by an agency of the Australian federal government. *See id.* CPA maintains that "[n]o other source of crawfish pricing data on the administrative record was collected with the same rigor or by a more qualified source." *Id.* Commerce failed, CPA argues, to comply with 19 U.S.C. § 1677b(c)(2) because the ABARE statistics are superior to Mulataga's price list. *See id.*

2. Commerce's Contentions

Commerce responds that it properly exercised its discretion in deciding to use Mulataga's price list for the surrogate values. *See* Commerce's Mem. at 23–27. Commerce has broad discretion in the valuation of FOP and its methodology should be upheld as long as it is reasonable. *See id.* at 23–24. Here, Commerce took into consideration the smaller size of Chinese crawfish, which are a different species than the Australian yabby, to determine the appropriate surrogate values. *See id.* at 24. Recognizing that yabbies are a larger species of crawfish than those used in China, Commerce selected yabby prices that would be comparable to Chinese crawfish. *See id.* at 27. Commerce also found that, in Australia, yabbies weighing 40 grams or less and larger seconds are more likely processed into tail meat. *See id.* at 24. Additionally, Commerce found that seconds, rather than larger unblemished crawfish, command a lower price, which is more similar to what the price for crawfish should be in the PRC. *See id.*

Commerce used Mulataga because its "prices reflected the prices paid by Australian processors to the farmers and catchers at the same point of distribution as the whole live freshwater crawfish in China." *Id.* at 24. Commerce chose Mulataga because it is the largest producer of yabbies in Australia, and its "data was verified, reliable, product-specific, average non-export values representative of prices over several years including the POR. . . ." *Id.* In contrast, Commerce found that the ABARE prices on the record include the wider range of crawfish produced in Australia and are thus not comparable to the smaller size Chinese crawfish. Commerce was within its discretion to determine that Mulataga's prices were the most comparable to Chinese crawfish and, therefore, the "best available information."

B. Analysis

The Court rejects CPA's complaint that Commerce erred in using Mulataga's price list for the valuation of live crawfish. CPA argues that Commerce's reasons for rejecting the ABARE statistics does not support its preference for using Mulataga's list prices. *See* CPA's Mem. at 15. CPA further contends that Commerce erroneously concluded that Chinese processors typically use live crawfish weighing

only 30–40 grams even though there is record evidence that Chinese crawfish processors use crawfish weighing 41–76 grams. CPA's Mem. 8–9. The Court, however, does not agree because Commerce's determination was reasonable and supported by substantial record evidence.

Agency statements provide guidance to regulated industries. " 'An [agency] announcement stating a change in the method . . . is not a general statement of policy.' " *American Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 464 n.49 (5th Cir. 1981) (quoting *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) (internal quotations omitted)). While a policy denotes "the *general principles* by which a government is guided" by laws, BLACK'S LAW DICTIONARY 1178 (7th ed. 1999) (emphasis added), methodology refers only to the "*mode* of organizing, operating or performing something, especially to achieve [the goal of a statute]." *Id.* at 1005 (defining mode) (emphasis added). *Accord Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Interstate Natural Gas Ass'n of Am. v. Federal Energy Regulatory Comm'n*, 716 F.2d 1 (D.C. Cir. 1983); *Hooker Chems. & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976). Consequently, the courts are even less in the position to question an agency action if the action at issue is a choice of methodology, rather than policy. *See, e.g., Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1043 (10th Cir. 1997) (citing *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983)). Commerce's methodology does not have to be "the only way or even the best way to calculate surrogate values for factors of production as long as it was reasonable." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT ___, ___, 159 F. Supp. 2d 714, 721 (2001).

Commerce has broad discretion in deciding what constitutes the best available information. The Court's role in evaluating CPA's challenge to Commerce's methodology is to determine whether such methodology is supported by substantial evidence and in accordance with law. *See id.* Commerce notes that it would have preferred to use the ABARE prices to value live crawfish. *See Issues & Decision Mem.* at 22. The ABARE price data, however, contained information on prices paid for all sizes of yabby. The difference in crawfish sizes used by tail meat producers in Australia and China, and "the fact that only the small, seconds or surplus yabbies go into tail meat production in Australia, [led Commerce] to conclude that using the total value and volume inclusive of all sizes, as issued by ABARE, is not appropriate in this case. . . ." *Issues & Decision Mem.* at 15. Commerce reasonably concluded that smaller yabbies, while not identical to Chinese crawfish, were comparable to Chinese crawfish in size, *see id.* at 14, and that Mulataga's price list was a better source for surrogate values than the ABARE data.

III. Commerce's Properly Rejected Information Regarding a Possible Affiliation Between Qingdao and a Chinese Crawfish Exporter

1. Contentions of the Parties

A. CPA's Contentions

CPA complains that Commerce improperly rejected evidence that Qingdao had failed to disclose all relevant corporate affiliations. *See* CPA's Mem. at 16–22. Specifically, CPA contends that the final antidumping duty margin for Qingdao should be based on adverse facts available because the record indicates that Qingdao failed to disclose its affiliation with another producer and exported of the subject merchandise, China I/E Corporation of State Farms, Qingdao Branch ("China I/E"). *See id.* at 17–18. On November 1, 2001, CPA submitted publicly available information ("PAI") consisting of six exhibits number 28 through 32 ("November Submission"). *See id.* at 16. The November Submission included pages from a website that identified Mrs. Wang Shuzhen as the general manager for China I/E. *See id.* It also included pages describing the specific sizes of crawfish tail meat produced and offered for export sale by China I/E. *See id.* The portion of Exhibit 30 that showed that China I/E produced tail meat in the size range of 60–80 tails per pound was "used to support a calculation of a possible surrogate value for live crawfish." *Id.* at 17. In addition, Exhibit 30 included domain name registration data indicating that China I/E owned the website's domain name. *See id.* 16–17. CPA maintains that it included this information in the November Submission to authenticate the information submitted. *See id.* Accordingly, CPA contends that the November Submission did not contain new factual information pursuant to 19 C.F.R. § 351.301(c)(3) (1999) because its purpose was to show that Qingdao produced tail meat in the size range of 60–80 tails per pound. *See id.* at 17–21.

While the November Submission's purpose was to aide Commerce in choosing a surrogate value, Exhibit 30 also demonstrates that China I/E and Qingdao were affiliated entities, which indicates that Qingdao had not been forthcoming in disclosing its corporate affiliations. *See id.* at 20. Although the information regarding Qingdao and China I/E was placed on the record in the November Submission, CPA was precluded from making any legal arguments about the possible affiliation between the two companies. *See id.* at 19. Commerce did not address any of the information contained in the November Submission until March 21, 2002. *See id.* at 18. Commerce informed the parties, prior to the public hearing on March 22, 2002, that the pages in the November Submission regarding the domain name registration were to be stricken from the record as untimely new factual information. *See id.* at 19. Commerce indicated, however, that several pages in the November Submission regarding surrogate values were not untimely and would be retained on the record. *See id.*

CPA maintains that "there can be no question that PAI Exhibit 30 [of the November Submission] was timely submitted." *Id.* at 21. Rather, CPA argues that the central issue is whether Exhibit 30 "could legitimately be used for any purpose other than assigning a specific surrogate value to a specific factor of production." *Id.* There is no statutory provision or regulation that precludes timely arguments based on timely factual information. CPA states that 19 U.S.C. § 1677m(g) (1994) "requires Commerce to accept comment from all interested parties regarding the factual information on the administrative record." CPA's Mem. at 21. Moreover, CPA maintains that, under 19 U.S.C. § 1516a(b)(2)(A)(i) (1994), the administrative record includes all information presented to Commerce during the administrative proceeding. *See id.*

Since the deadline for submissions of factual information had already lapsed, Commerce was left with two options. *See* CPA's Mem. at 22. Commerce could have left the record closed and applied adverse inferences against Qingdao, or requested further information about Qingdao's corporate affiliations and rendered a decision accordingly. *See id.* Rather, Commerce chose to reject the information as part of the record. *See id.* Accordingly, CPA requests that the issue be remanded to Commerce to reconsider Qingdao's dumping margin "in light of record evidence of its undisclosed affiliation with China I/E Corp. or such other evidence," which Commerce may discover upon reopening the record and further investigating. *Id.*

B. Commerce's Contentions

Commerce responds that it properly rejected parts of CPA's November Submission regarding a possible affiliation between Qingdao and China I/E because the regulatory deadline for submissions of new factual information had expired. *See* Commerce's Mem. at 27–31. Commerce's regulations specify deadlines for the receipt of particular information. *See id.* at 28. In the case at bar, the deadline for the receipt of new factual information, pursuant to Commerce's regulations, was February 17, 2001. *See id.* The deadline for the submission of PAI to value FOP was 20 days after the publication of the *Preliminary Results*, 66 Fed. Reg. 52,100, which was November 1, 2001. *See* Commerce's Mem. at 28. Commerce contends that the information regarding a possible affiliation between Qingdao and China I/E was new factual information unrelated to the valuation of FOP submitted after the deadline for such information. *See id.* at 29.

Contrary to CPA's assertion, Exhibit 30 of the November Submission did not relate to the valuation of FOP. *See id.* The first two pages contained information about the different sizes of crawfish tail meat produced and exported by a Chinese crawfish company. *See id.* The next two pages, however, contained domain name registration information. *See id.* Commerce asserts that "the only argument that CPA advanced was that [Commerce] should use Australian surrogate

values for crawfish in the 40–70g size range because crawfish in that range are used by the Chinese freshwater crawfish companies to produce subject merchandise." *Id.* In its case brief submitted on November 27, 2001, CPA argued for the first time that the record showed Mrs. Wang Shuzhen was the general manager of Qingdao and that after the POR she became the general manager of China I/E. *See id.* Commerce's "regulations establish deadlines in order to afford Commerce ample time to investigate the allegations raised by interested parties." *Id.* at 30. Here, Commerce had already verified Qingdao's questionnaire responses. *See id.* at 30–31. Consequently, Commerce maintains that it properly rejected the information regarding a possible affiliation contained in the November Submission because this information "could not be subject to verification or meaningfully analyzed by [Commerce]. . . ." *Id.* at 31.

2. Analysis

Commerce's regulations set forth the deadlines for the receipt of particular information from interested parties in an administrative proceeding. *See* 19 C.F.R. § 351.301 (1999). The deadline for the submission of factual information is 140 days after the anniversary month. *See* 19 C.F.R. § 351.301(b)(2). Interested parties may submit PAI to value FOP within 20 days after the publication date of Commerce's preliminary results. *See* 19 C.F.R. 351.301(c)(3)(ii). In the case at bar, CPA argues that Commerce ignored these regulations and improperly rejected information submitted as untimely submitted new factual information. The Court finds, however, that Commerce properly rejected the portions of the November Submission that did not relate to the valuation of FOP. The Court agrees with CPA that Exhibit 30 contained PAI to value FOP. CPA essentially argues, however, that if Commerce accepts portions of the November Submission, then Commerce must accept all of the information contained therein. The Court does not agree because, pursuant to its regulations, Commerce is not required to accept new factual information after the deadline has expired. *See* 19 C.F.R. § 351.301. Commerce may reject actual information imbedded in PAI to value FOP if such information does not relate to FOP valuation.

The information regarding the possible affiliation between Qingdao and China I/E is not related to the information submitted for the valuation of FOP. The only information contained in Exhibit 30 relating to FOP concerns the size of tail meat produced in China. *See* App. Br. CPA Supp. Mot. J. Agency R. ("CPA's App.") at Tab 5. The deadline for the submission of PAI to value FOP was November 1, 2001. *See* 19 C.F.R. § 351.301(c)(3)(ii). Accordingly, Commerce correctly included in the record the portions of Exhibit 30 that pertained to the proper choice of surrogate values. Commerce was not required by its regulations to include factual information submissions after the deadline for such, which was February 17, 2001. *See*

19 C.F.R. § 351.301(b)(2); *see also Reiner Brach GmbH & Co.KG v. United States*, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1334 (2002) (stating that "[t]his Court has previously held that Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits, to be reasonable. . ."). If CPA had submitted information regarding the possible affiliation of the two companies prior to February 17, 2001, however, Commerce would have been required to accept the information as part of the administrative record. *See* 19 C.F.R. § 351.301(b)(2). CPA failed to submit such information prior to the February deadline. *See* CPA's App. at Tab 5. Consequently, the Court finds that Commerce properly rejected portions of the November Submission unrelated to the valuation of FOP as untimely new factual information.

IV. Commerce Properly Adjusted Qingdao and Yancheng's By-Product Offset to NV

1. Contentions of the Parties

Qingdao and Yancheng complain that Commerce erred in its calculation of NV and contravened its previous surrogate value methodology. *See* Qingdao & Yancheng's Mem. at 25–29. Specifically, Qingdao and Yancheng argue that Commerce did not adjust the total cost of production by the full offset value of by- product shell scrap resulting from the production of crawfish tail meat.[9] *See id.* at 25. Instead, Commerce reduced the offset by applying a "wet-dry conversion factor" of 27.5 percent to the by- product offset. *See id.* Commerce's established practice is to calculate NV for NME respondents as if the NME producers' FOP were in a market economy country. *See id.* In the case at bar, Commerce rejected the adjustment of surrogate values according to the particular experiences of the respondents. *See id.* at 26. In the past, Commerce has "accept[ed] the surrogate values as they are, and not attempted to adjust those values for differences, whether real or perceived, between the production processes used by the surrogate country producer(s) and the NME producers." *Id.* at 27. Here, Commerce found that Chinese producers dried crawfish shells in the sun and sold them as a by-product. *See id.* Commerce compared this process to information from a Canadian company that sold industrially dried shell scrap. *See id.* at 26.

Commerce concluded that an adjustment to the offset was required because the two drying process were not comparable. *See id.* Qingdao and Yancheng assert that there is no basis for Commerce's

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[9] "Scrap" is the term used to describe part of the crawfish not used in the production of crawfish tail meat and principally consists of crawfish shell, unused meat and water. *See Hontex Enter., Inc., d/b/a Louisiana Packing Co. v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1323, 1348, n.24 (2003).

comparison of drying methodology of an NME producer to that of a surrogate producer. *See id.* at 27. Moreover, Commerce's analysis contains factual flaws because it assumed that all of the respondents dried the crawfish shell scraps similarly, without verifying reports of each individual company. *See id.* The record does not substantiate Commerce's conclusion that Qingdao's scrap shells were not completely dry when sold. *See id.* at 27–28. Qingdao and Yancheng challenge the use of a wet-dry conversion factor of 27.5 percent when the term "half-dry" used in the verification report for Qingdao, "suggest[s] that the ratio should be at least 50–50." *Id.* at 28. Commerce's conclusion that sun dried shells are less dry than those put through an industrial process is not supported by record evidence. *See id.*

Commerce responds that it was proper to apply a wet-dry conversion factor to the crawfish by-product factor. *See* Commerce's Mem. at 31–35. Commerce asserts that it reasonably applied a 27.5 percent conversion factor because the scrap value on the record is for shells industrially dried. *See id.* at 32–33. To determine the value of the by-product, Commerce used a price quotation of a Canadian seller of crustacean scrap, which was industrially dried. *See id.* at 33. Commerce maintains that no information was placed on the record demonstrating that the Chinese "companies' 'half dry' or 'sun-dried' shells are comparable to industrially dried shells." *Id.* Qingdao and Yancheng had the burden, and failed, to place contradictory information on the record calling into question the accuracy of the wet-dry conversion factor. *See id.*

2. Analysis

The Court finds that Commerce reasonably determined that a conversion factor was necessary to better reflect the value of the crawfish by-product. *See Hontex*, 27 CIT at ____ , 248 F. Supp. 2d at 1348–49. Qingdao and Yancheng essentially argue that Commerce used unreliable and unsubstantiated information in determining to use a 27.5 percent conversion factor. None of the interested parties, however, submitted information to contradict or put into question the accuracy of the 27.5 percent conversion factor. Without any contradictory evidence on the record, Commerce properly concluded that industrially dried shells are different than "sun dried" or half-dried" shells. In valuing FOP in the NME country context, Commerce enjoys considerable discretion. *See Lasko*, 43 F.3d at 1446; *see also Hontex*, 27 CIT at ____ , 248 F. Supp. 2d at 1349 (holding that Commerce's use of a wet-dry conversion factor to calculate a value for crawfish tail meat scrap is supported by substantial evidence and in accordance with law). Here, Commerce reasonably applied its discretion in applying a wet-dry conversion factor of 27.5 percent to the by-product offset for crawfish.

V. Commerce Improperly Rejected Certain Submission's by Hontex as "New Information"

1. Contentions of the Parties

Hontex complains that Commerce erred in rejecting certain submissions made to rebut reports made after its analysts' trip to Spain. *See* Hontex's Mem. at 15–23. Hontex submitted certain exhibits on March 19, 2002, and March 20, 2002, relating to a crawfish study prepared by a Dr. Martinez, a public notice of a conference where Dr. Martinez reported the results of his study, and three affidavits from individuals interviewed by Commerce during its trip to Spain to gather information about the Spanish crawfish industry (the "Spanish Trip"). *See id.* at 16. Commerce, however, rejected certain portions of Hontex's submission that it deemed new factual information. *See id.* Hontex contends that the information is not new factual information because the study and notice of appearance rebut and clarify Commerce's Spanish Trip report. *See* Hontex's Mem. at 17–18. Hontex asserts that there is a "high probability that [Commerce] itself already has knowledge (if not a copy) of Dr. Martinez's study, [and] it would be unfair and unreasonable to penalize Respondents," because Commerce failed to place the study on the record. *Id.* at 19. In addition, Hontex maintains that the three affidavits it submitted were meant to demonstrate that the Spanish Trip report was incomplete and factually incorrect. *See id.* The information submitted casts doubt on the veracity of Dr. Martinez's statements and the accuracy of the *Spanish Study*. *See id.* at 17–18. Hontex argues that this information "was already incorporated by reference into the record, and was thus not 'new factual information' pursuant to 19 C.F.R. § 351.301." *Id.* at 17. By placing the Spanish Trip report on the record, Commerce placed new factual information on the record thereby allowing Hontex to submit clarifying or rebuttal information. *See id.* Finally, even if the information Hontex submitted was deemed "new factual information," Commerce has the discretion pursuant to 19 C.F.R. § 351.302 (1999) to accept such information. *See id.* at 20.

Commerce responds that the information submitted by Hontex did not rebut, clarify or correct factual information provided by another interested party. *See* Commerce's Mem. at 36. Commerce maintains that 19 C.F.R. § 351.301(c)(1) "specifically provides that rebuttal or clarification information can be submitted in response to information submitted 'by any other interested party,' " and does not apply to information Commerce places on the record. *Id.* at 37. Commerce further argues that Hontex has the burden of creating an adequate record. *See id.* Accordingly, any reference to the study and the conference attended by Dr. Martinez in the *Spanish Study* "does not provide Hontex with the latitude or authority to submit new information on the record." *Id.* Commerce maintains that it properly exer-

cised its "expressed grant of authority provided by the regulations and determined not to exercise its discretion in declining to accept the information that Hontex submitted." *Id.* at 38.

2. Analysis

The deadline for new factual information, pursuant to 19 C.F.R. § 351.301(b)(2) is 140 days after the last day of the anniversary month. In the case at bar, the deadline for new factual information submissions was February 17, 2001. Pursuant to 19 C.F.R. § 351.301(c)(1), "[a]ny interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section for submission of such factual information . . . no later than 10 days after the date such information is served on the interested party. . . ." Hontex argues that its submissions of March 19, 2002, and March 20, 2002, were made to rebut and clarify Commerce's findings contained in its Spanish Trip report, which was placed on the record on March 12, 2002. *See* Hontex's Mem. at 15–23. Commerce responds that it properly exercised its discretion and rejected the information submitted by Hontex as too late in the proceeding. The Court does not find this argument convincing and finds that Commerce improperly rejected Hontex's submissions.

Commerce's regulations allow for interested parties to submit factual information that rebuts, clarifies or corrects factual submissions made by interested parties. *See* 19 C.F.R. § 351.301(c)(1). Commerce asserts that Hontex's submission does not clarify or rebut factual information submitted by an interested party since Commerce, placed the Spanish Trip report on the record. This argument is unsustainable because under Commerce's interpretation of its regulations, Commerce could place erroneous factual information on the record and interested parties would not be afforded the opportunity to rebut or clarify such record evidence. While Hontex has the burden of creating an adequate record within the regulatory guidelines, Hontex, in this instance, met its burden. Commerce invited parties to provide comments to the Spanish Trip report after it was placed on the record and gave them a deadline of March 18, 2002, which was then extended to March 19, 2002. *See* Def.'s Pub. Ex. at Tabs 21–24. Hontex complied with this deadline, yet Commerce rejected Hontex's comments on the Spanish Trip report as untimely new factual information. *See id.* at Tab 24. Hontex's comments were meant to clarify and rebut Commerce's Spanish Trip report, yet Commerce merely rejected the information as untimely new factual information. *See id.* Consequently, the Court remands this issue with instructions to Commerce to include the submissions made by Hontex on March 19, 2002, and March 20, 2002, as part of the administrative record and explain what bearing, if any, these submissions have on Commerce's final determination.

VI. Commerce's Determination to Assign a Joint Rate to Nanlian and Jiangsu

1. Contentions of the Parties

A. Hontex's Contentions

Hontex complains that Commerce erred in applying a single antidumping duty rate to Nanlian and Jiangsu. *See* Hontex's Mem. at 23–24. Specifically, Hontex argues that this issue was previously decided by the Court in *Jiangsu Hilong Int'l Trading Co., Ltd. v. United States*, 26 CIT ___, 240 F. Supp. 2d 1313 (2002). *See id.* at 23. Plaintiff, in that case, sought and received a temporary restraining order and preliminary injunction dated June 4, 2002. *See id.* Hontex maintains the "Court affirmed the assignment of a separate deposit rate for Jiangsu Hilong."[10] *See id.* at 24

B. Commerce's Contentions

Commerce contends that it properly determined that Nanlian and Jiangsu should be treated as a single entity and assessed them the same antidumping duty rate. *See* Commerce's Mem. at 39–46. Beginning with the first administrative review, Commerce found that the "nature of the relationships between these two companies constituted a web of control relationships such that prices and exports were subject to significant manipulation." *Id.* at 39. In the review at issue, Commerce continued to treat the two companies as a single entity because it "found evidence of a 'continuing commercial relationship' between these companies, and evidence of a 'continuing business relationship' between Mr. Wei Wei and both companies." *Id.* at 39–40. Commerce made this determination after considering evidence uncovered at verification. *See id.* at 43. Commerce maintains that "[w]hile Hontex takes issue with the agency's reliance upon the information on this administrative record and from prior proceedings, the burden of producing information in an administrative proceeding lies with the interested party." *Id.* Commerce determined that no new evidence had been presented during the review. *See id.* Consequently, Commerce did not reconsider the relationship between Jiangsu and Nanlian. *See id.*

Commerce also asserts that Hontex's complaint is defective because it failed to raise its arguments before Commerce; "[The argument] was raised for the first time before this Court." *Id.* at 40. Under the doctrine of exhaustion of administrative remedies, this Court should not consider Hontex's complaint because it was not raised at

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[10] The Court notes that Hontex does not fully address its complaints in its brief. Rather, in Exhibit 1 to its brief, almost as an afterthought or indeed to avoid page limitations imposed by the Court, Hontex includes additional arguments as to why Commerce's assignment of a joint rate was in error. *See* Hontex's Mem. at Ex. 1.

the administrative level. *See id.* at 40–41. Commerce asserts that "[t]his is especially so where Commerce has not changed its determination between the preliminary and final results but the complainant failed to avail itself of the opportunity to raise its argument during the administrative proceeding." *Id.* at 41. Additionally, Commerce points out that, contrary to Hontex's assertion, this Court did not rule on the merits of the issue in *Jiangsu*, 26 CIT ___ , 240 F. Supp. 2d 1313. Rather, the Court ruled on a procedural matter and "only determined that Jiangsu had met the threshold for granting a preliminary injunction. . . ." *Id.* at 45.

2. Analysis

As a preliminary matter, Commerce contends that Hontex is precluded from raising the issue of Commerce's assignment of a single antidumping duty rate to Jiangsu and Nanlian pursuant to the doctrine of exhaustion of administrative remedies. *See* Commerce's Mem. at 40–41. Commerce argues that Hontex failed to raise its argument regarding the assignment of a single duty rate on the administrative level prior to raising the issue before this Court. *See id.* The Court rejects Commerce's arguments and finds, for the reasons set forth below, that Hontex is not precluded from raising the issue before this court.

The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court. *See Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") There is, however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. *See Alhambra Foundry Co. v. United States*, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988). Section 2637(d) of Title 28 of the United States Code states that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. *See Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998). Therefore, because of "judicial discretion in not requiring litigants to exhaust administrative remedies," the Court is authorized to determine proper exceptions to the doctrine of exhaustion. *Alhambra Foundry*, 12 CIT at 347, 685 F. Supp. at 1256 (citing *Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986), *rev'd in part on other grounds*, *Koyo Seiko Co. v. United States*, 20 F.3d 1156 (Fed. Cir. 1994)).

The Court exercises its discretion to obviate exhaustion where: (1) requiring it would be futile, *see Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984) (in those cases when "it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions, *see Timken*, 10 CIT at 93, 630 F. Supp. at 1334; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question, *see id.*; *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1337–39 (D.C. Cir. 1983); and (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. *See Philipp Bros., Inc. v. United States*, 10 CIT 76, 79–80, 630 F. Supp. 1317, 1321 (1986).

While a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it. *See generally*, *Hormel v. Helvering*, 312 U.S. 552 (1941); *see also Rhone Poulenc Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The sole fact of an agency's failure to address plaintiff's challenge does not invoke the exhaustion doctrine and shall not result in forfeiture of plaintiff's judicial remedies. *See generally*, *B-West Imports, Inc. v. United States*, 19 CIT 303, 880 F. Supp. 853 (1995). An administrative decision to ignore the issue cannot be dispositive of the question whether or not the issue was properly brought to the agency's attention. *See, e.g.*, *Allnutt v. United States DOJ*, 2000 U.S. Dist. LEXIS 4060 (D. Md. 2000). In the case at bar, Commerce had a sufficient opportunity to address the propriety of assigning a single rate duty to Jiangsu and Nanlian. While Nanlian did not raise the issue in its case brief, Commerce was sufficiently alerted of the issue by Jiangsu in its case brief. *See* Def.'s Pub. Ex. at Tab 18. The central issue in Jiangsu's case brief is the assignment of one duty rate to Jiangsu and Nanlian. *See id.* Hontex is not precluded from raising the issue before this Court because Commerce was provided with an opportunity to address the issue.[11]

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[11] Hontex contends that the exact issue and set of facts regarding the assignment of a single duty rate was previously decided by the Court in *Jiangsu*, 26 CIT ____ , 240 F. Supp. 2d 1313. According to Hontex, the Court determined that Jiangsu and Nanlian are separate

During the review at issue, Commerce found evidence of a continuing commercial relationship between Jiangsu and Nanlian and applied a single duty rate to the two companies as it had done in its previous administrative reviews.[12] Commerce's NME exporter collapsing methodology—applied in the first administrative review for the subject merchandise—is permissible to the extent that Commerce follows market economy collapsing regulations. *See Hontex*, 27 CIT at ____ , 248 F. Supp. 2d at 1342. Where Commerce's NME collapsing methodology has departed from the regulations concerning market economy collapsing, however, the Court must determine "whether Commerce has sufficiently articulated a permissible interpretation of the antidumping statute with its stated NME collapsing methodology."[13] *Id.* at 1341.

In the case at bar, Commerce found that the nature of the connections between the two companies constituted a web of control relationship. Commerce asserts that it re-examined the relationship between the two companies and conducted a verification of the information presented during this review. *See id.* Commerce argues that Hontex had the burden of creating an administrative record, but failed to produce any evidence indicating a change in circumstances. *See* Commerce's Mem. at 43–44. Commerce concluded that "the relationships existing in 1997, which formed the basis for the finding that these two entities were so intertwined that they should be assigned a single rate, remain essentially unchanged." *Id.* at 44. Based on the reasoning found in *Hontex*, 27 CIT ____ , 248 F. Supp. 2d 1323, it is not " clear . . . which set of factors formed the basis of Commerce's collapsing determination." *Queen's Flowers De Colom. v. United States*, 21 CIT 968, 979, 981 F. Supp. 617, 628 (1997). Accordingly, the Court remands this issue for further proceedings with instructions to Commerce to sufficiently articulate: (a) why its collapsing methodology for NME exporters is a permissible interpretation of the antidumping duty statute; and (b) why its findings warranted the collapsing of Jiangsu and Nanlian.

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entities. *See* Hontex's Mem. at 23–24. The issue in the case, however, was not whether the two companies are separate entities. The Court ruled on a procedural matter, whether Jiangsu had met the threshold for granting a preliminary injunction, and not on the merits of the case. *See Jiangsu*, 26 CIT ____ , 240 F. Supp. 2d 1313.

[12] Commerce's assignment of a single duty rate to two or more entities is also referred to as "collapsing" the entities into a single entity. *See Hontex*, 27 CIT at ____ , 248 F. Supp. 2d at 1337–1342. While the antidumping duty statute does not expressly provide for the collapsing of entities, this Court has upheld the practice, in the market economy context, as a reasonable interpretation of the statute. *See id.* (discussing the steps Commerce follows in determining whether a market economy producer should be collapsed).

[13] The Court thoroughly discusses, in turn, each of the factors considered by Commerce in its collapsing methodology for NME country exporters. *See Hontex*, 27 CIT at ____ , 248 F. Supp. 2d at 1342–1347.

VII. Commerce's Failure to Issue the *Final Results* Within the Required Statutory Time Period Does Not Render Them Void *Ab Initio*

1. Contentions of the Parties

Bo Asia et al. and Hontex complain that Commerce's *Final Results* are void *ab initio* because Commerce failed to issue them within the time frame required by the antidumping duty statute and its implementing regulations. *See* Bo Asia's Br. at 13–17; Hontex's Mem. at 24–26. Pursuant to 19 U.S.C. § 1675(a)(3)(A) (1994) and 19 C.F.R. § 351.213(h)(1) (1999), Commerce was required to issue the *Final Results* on February 8, 2001.[14] *See* Hontex's Mem. at 24. Rather than extend the deadline for the issuance of the *Final Results*, pursuant to 19 U.S.C. § 1675(a)(3)(A) and 19 C.F.R. § 351.213(h)(1), Commerce issued the *Final Results* on April 11, 2001, which was two months after the deadline passed. *See* Hontex's Mem. at 24. Hontex maintains that its counsel called Commerce to inquire whether an extension for the issuance of the *Final Results* had been formally issued and did not receive a response. *See id.*

Bo Asia et al. assert that the Statement of Administrative Action ("SAA") accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess., at 815 (1994), clearly indicates Congress' intention "to issue a mandate regarding deadlines to [Commerce] to prevent the dilatory style that was so problematic in pre-Uruguay Round administrative review." Bo Asia's Br. at 16. Hontex and Bo Asia et al. contend that Commerce wilfully violated the statute and should be held accountable. *See id.* 16–17; Hontex's Mem. at 25–26. Bo Asia et al. argue that "[u]nless this Court acts now to enforce the statutory and regulatory timetable, the procedural gains of the Uruguay Round will be lost, Congress' mandate will be contravened and parties will find themselves back in pre-Uruguay Round posture. . . ." Bo Asia's Br. at 16. Accordingly, the *Final Results* should be voided in order to "send a clear signal that deadlines have a meaning, and the willful failure to meet statutory deadlines has consequences." Hontex's Mem. at 26.

Commerce responds that its failure to meet the statutory deadline for the issuance of the *Final Results* does not render the results void *ab initio*. *See* Commerce's Mem. at 46–48. Commerce points out that no statute "establishes a consequence or penalty for issuing the final results after 120 days." *Id.* at 47. Consequently, the deadline imposed by the statute is directory and not mandatory. *See id.* Commerce maintains that the publication of the *Final Results* after the deadline's expiration does not render them void *ab initio*. *See id.*

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[14] Bo Asia et al. contend that the deadline for the issuance of the *Final Results* was February 11, 2001. *See* Bo Asia's Br. at 14.

2. Analysis

Section 1675(a)(3)(A) of Title 19 of the United States Code provides that Commerce issue its final results "within 120 days after the date on which the preliminary determination is published." Under the statute, Commerce may extend the 120 day period to 180 days if it is not practicable to complete the review within the 120 day time frame. Hontex and Bo Asia et al. point out that Commerce did not meet the 120 day deadline and failed to extend the deadline to 180 days. The Court finds that the statute is directory and not mandatory. While the statute uses the word "shall," which generally suggests mandatory action, *see Escoe v. Zerbst*, 295 U.S. 490, 493 (1935), a time period provided for in a statute "is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." *Alberta Gas Chemicals, Inc. v. United States*, 1 CIT 312, 315–16, 515 F. Supp. 780, 785 (1981) (citations omitted). Commerce should not shirk its duty to meet statutory deadlines and should strive to carry out the mandate codified in 19 U.S.C. § 1675(a)(3)(A). Nonetheless, there is no statutory consequence for Commerce's failure to comply in a timely fashion. Even though Commerce issued the *Final Results* after the deadline expired, they are not void *ab initio*.

VIII. Commerce Properly Determined that Fujian and Pacific Coast are not Affiliated Parties

1. Contentions of the Parties

Bo Asia et al. complain Commerce improperly determined that Fujian and Pacific Coast are not affiliated parties. *See* Bo Asia's Br. at 17–22. Bo Asia et al. argue that there was ample evidence on the record indicating that Fujian owned a significant percentage of Pacific Coast. *See id.* at 17. Fujian submitted to Commerce: (a) a copy of the memorandum of understanding between Fujian andPacific Coast reflecting an agreement whereby Fujian was to acquire shares of Pacific Coast; (b) the promissory note signed as consideration for the acquisition of shares in Pacific Coast; and, (c) an explanation that its investment was made in the form of merchandise which was sold and the proceeds of which were deposited in Pacific Coast's account as payment upon the promissory note. *See id.* at 17–18. Nonetheless, Commerce found that there was no record evidence showing that Fujian had acquired any of Pacific Coast's equity. *See id.* at 18. The promissory note under Washington State law, the venue where the sale took place, can serve as adequate consideration for equity ownership. *See id.*

Bo Asia et al. maintain that Commerce did not reference the promissory note, which "is the principal instrument evidencing Fujian Pelagic's purchase of corporate shares; [and] any determination with-

out its consideration is by definition unsupported by substantial evidence on the record and otherwise not in accordance with law." *Id.* at 18–19. Commerce's focus on whether Fujian actually paid Pacific Coast for the corporate shares is misplaced. *See id.* at 19. Under Washington law, the transfer of stock ownership would be deemed to occur once the promissory note was executed, and "[t]he fact that Fujian Pelagic did in fact make a payment in the form of the delivery of merchandise only substantiates further the veracity of the acquisition." *Id.* Bo Asia et al. contend that in Commerce's view all corporate shares must be purchased in cash even though Washington law recognizes that "shares are acquired by many means [] other than cash investment." *Id.* at 20. Commerce equated Fujian's shares in Pacific Coast with the amount it paid to Pacific Coast during the POR. *See id.* Instead, Commerce should have based Fujian's ownership interest on the full amount it was obligated to pay under the terms of the promissory note. *See id.* Commerce chose not to verify Pacific Coast's records and did not request further documentation of the arrangements between Pacific Coast and Fujian. Consequently, Fujian's responses to Commerce's questionnaire stating its acquisition of a percentage of Pacific Coast, "along with submission of the promissory notes and the memorandum of understanding, should be sufficient to establish the acquisition absent contradictory evidence on the record, which in this case, there is not." *Id.* at 21.

If the Court finds that the two companies are not affiliated by virtue of common ownership, Bo Asia et al. alternatively argue that the companies are affiliated pursuant to 19 U.S.C. § 1677(33)(G) (1994). *See* Bo Asia's Br. at 21. The statute provides for the finding of an affiliation between persons when one controls another person. *See id.* Fujian's president and general manager serves as the vice president of Pacific Coast, and each of Fujian's shareholders is a member on Pacific Coast's Board of Directors. *See id.* at 22. Consequently, Fujian "is involved in all key decision making matters of Pacific Coast," and exercises control over the management of Pacific Coast. *Id.*

B. Commerce's Contentions

Commerce replies that it properly determined that Fugian and Pacific Coast are not affiliated because there was no record evidence indicating potential control or ownership between the two entities. *See* Commerce's Mem. at 48–53. Commerce argues that it properly treated Fujian's sales to the United States "as export price [ ] sales because the first sales were made to unaffiliated purchasers prior to importation, and constructed export price [] was not otherwise warranted." *Id.* at 48. Pursuant to 19 U.S.C. § 1677(33), Commerce considered whether Fujian's investment in Pacific Coast amounted to five percent of the total shares of Pacific Coast. *See id.* at 50. Commerce argues that there was no record evidence demonstrating a

transfer of investment through money or merchandise between the two companies. *See id.* at 49–50. Bo Asia et al.'s statement that the promissory note is ample consideration for the issuance of corporate shares is misplaced because Commerce "applies the antidumping duty law, and under 19 U.S.C. § 1677(33), Fujian Pelagic has failed to demonstrate that there was any investment in Pacific [Coast] or that these two companies are affiliated in any other way." *Id.* at 51. Fujian failed to provide documentation illustrating that it had paid in capital to Pacific Coast before or during the POR; "[t]he only documentation submitted by Fujian Pelagic *et al.* that relates to Fujian Pelagic's claimed investment in Pacific Coast is the sale from Pacific Coast to a seafood broker in the United States." *Id.* (quoting *Issues & Decision Mem.* at 51). Commerce asserts that Bo Asia et al. has the burden of creating a complete and accurate record and failed to do so in this review. *See id.* at 52.

Commerce also contends that Bo Asia et al. failed to adequately establish that Fujian controls Pacific Coast. Commerce could not "determine that one person was legally or operationally in control of Fujian Pelagic and Pacific Coast because Bo Asia, et al. failed to provide any evidence concerning the role and responsibilities that the one individual had as both the president of Fujian Pelagic and the vice president of Pacific Coast." *Id.* at 50–51. Commerce points out that the record indicates that a person unaffiliated with Pacific Coast served as treasurer. *See id.* at 52. Finally, the evidence does not support a determination that Fujian and Pacific Coast are affiliated.

2. Analysis

The Court finds that Commerce properly determined that Fujian and Pacific Coast are not affiliated parties under the relevant statutes. Section 1677(33) of Title 19 of the United States Code defines "affiliated persons" as:

> (B) Any officer or director of an organization and such organization.
>
> . . .
>
> (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> . . .
>
> a person shall be considered to control another person if the person is legally or operationally in a position to exercise re-

straint or direction over the other person.

Bo Asia et al. argue that Fujian owns more than five percent of Pacific Coast, rendering the two companies affiliated pursuant to 19 U.S.C. § 1677(33)(E). In its review, Commerce requested Fujian "provide any documentation to demonstrate that it had actually paid in capital to Pacific Coast prior to or during the POR." *See Issues & Decision Mem.* at 51. Fujian subsequently submitted documents demonstrating a sale from Pacific Coast to a United States seafood broker. *See id.* Fujian's submission included (a) the invoice/packing list from Pacific Coast; (b) a purchase order from the seafood broker to Pacific Coast; and (c) proof of payment from the seafood broker to Pacific Coast. *See id.*

Fujian has the burden of producing a complete and accurate record. *See Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993). Fujian's submissions, however, do not sufficiently demonstrate that the merchandise sold by Pacific Coast originated from Fujian. Commerce reasonably determined that "there is no documented connection which ties [the sale from Pacific Coast to the seafood broker] to the shipment from Fujian Pelagic that purportedly represents Fujian Pelagic's investment in Pacific Coast." *Issues & Decision Mem.* at 52. Bo Asia et al. alternatively argue that Fujian and Pacific Coast are affiliated because of their common control. While the record indicates that Fujian's president and general manager is also vice-president of Pacific Coast, there is no evidence depicting the duties of Pacific Coasts vice-president. Without such evidence, Commerce reasonably determined that it could not evaluate how much, if any, control Fujian exerted over Pacific Coast. The Court finds that Commerce reasonably determined that Fujian had not made an investment, whether in cash or in the form of a promissory note, in Pacific Coast and that Fujian did not exercise control over Pacific Coast.

IX. Commerce Properly Applied Facts Available to Qingdao Zhengri and Yaou

1. Contentions of the Parties

Bo Asia et al. complain that Commerce erred in applying adverse facts available to Qingdao Zhengri and Yaou. *See* Bo Asia et al.'s Mem. at 22–27. Qingdao Zhengri and Yaou submitted a consolidated response to sections C and D of Commerce's questionnaire. *See id.* at 22. While Qingdao Zhengri informed Commerce that it would not participate in a verification of its questionnaire responses, Yaou indicated that it would participate in such verification. *See id.* at 23. Commerce subsequently determined that the consolidated questionnaire responses could not be verified because Qingdao Zhengri would not permit verification of its responses. *See id.* Consequently, Commerce applied adverse facts available to Qingdao Zhengri and Yaou

which resulted in a PRC-wide rate for all of Yaou's subject sales. *See id.* Bo Asia et al. assert that adverse facts available should not be applied to Yaou because it acted to the best of its ability to cooperate with Commerce. *See id.* Yaou did not wilfully withhold information from Commerce and responded to all the questionnaires and requests made by Commerce. *See id.* Yaou offered Commerce all of its company books and records at verification and provided Commerce all of its sales and FOP information. *See id.*

Bo Asia et al. assert that under the relevant statute Commerce must meet a high standard before it can take an adverse inference. *See id.* at 23–24. Commerce may take such an inference "only where if can determine that an interested part[y] has 'failed to cooperate by not acting to the best of its ability to comply with a request for information by [Commerce]." *Id.* at 24 (quoting 19 U.S.C. § 1677e(b) (1994). In addition, Commerce must first find willful misconduct before applying an adverse inference. *See id.* Commerce's determination must be made through a reasoned inquiry and supported by substantial evidence. *See id.* Bo Asia et al. maintain Commerce should have applied neutral facts available to approximate Yaou's dumping rate because Commerce did not provide a reasoned analysis and its determination that Yaou did not act to the best of its ability was not based on substantial evidence. *See id.* at 25.

Commerce responds that it was proper to apply a PRC-wide rate to Qingdao and Yaou. *See* Commerce's Mem. at 53–56. Commerce argues that its inability to verify the questionnaire responses submitted by Qingdao Zhengri and Yaou justified the application of adverse facts available to Yaou. *See id.* at 53. Commerce found that the two companies constituted a single entity, and that since one refused to submit to verification Commerce could not verify only part of the consolidated response. *See id.* at 53–54. Commerce could not determine the veracity of the information submitted by Qingdao Zhengri and Yaou because it could not verify such information. *See id.* at 54. Under the relevant statute, the application of adverse facts available is warranted when Commerce cannot verify the information provided. *See id.* Commerce also asserts that it reasonably determined that Yaou failed to cooperate on account of Qingdao Zhengri's refusal to participate in verification. Since Commerce considered Qingdao Zhengri and Yaou to be a single entity, it "could not verify part of the entity and assign a separate antidumping margin for Yaou." *Id.* Commerce maintains that Yaou did not challenge the collapsing of the two entities and that it properly applied adverse facts available to Qingdao Zhengri and Yaou. *See id.*

2. Analysis

The Court finds Bo Asia et al.'s argument, that Commerce unjustifiably applied adverse facts available to Qingdao Zhengri and Yaou, has no merit. Under section 1677e(a)(2) of Title 19 of the United

States Code, Commerce shall use "facts otherwise available" when "(1) necessary information is not available on the record, or (2) an interested party or any other person—(A) withholds information that has been requested . . . or (D) provides such information but the information cannot be verified . . . in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a). The antidumping duty statute mandates that Commerce use "facts otherwise available" (commonly referred to as "facts available") if "necessary information is not available on the record" of an antidumping proceeding. *See* 19 U.S.C. § 1677e(a)(1).

Furthermore, if Commerce determines that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information . . . [then Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Commerce may apply facts available when it determines that an interested party withholds requested information or fails to cooperate with a request for information. *See* 19 U.S.C. § 1677e(a) & (b). The legislative goal behind Commerce's right to use facts available is to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner. . . ." *National Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994). Consequently, Commerce enjoys broad, although not unlimited, discretion with regard to the propriety of its use of facts available. *See generally*, *Olympic Adhesives Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990) (acknowledging Commerce's broad discretion to use facts available, but pointing out that Commerce's resort to facts available is an abuse of discretion where the information Commerce requests does not and could not exist).

The Court finds Commerce's rationale for resorting to adverse facts available convincing and reasonable. During the subject review, Qingdao Zhengri and Yaou reported to Commerce that their responses to Commerce's questionnaire regarding volume and value information would be consolidated because the two companies shared a common owner. *See Issues & Decision Mem.* at 52. Qingdao Zhengri informed Commerce that it would not participate in verification. *See id.* Commerce informed both companies that, based on Qingdao's refusal to submit to verification, Commerce could not verify only part of the consolidated responses. *See id.* at 55. Commerce indicated to the companies that "if a company objects to verification, [Commerce] will not conduct verification and may disregard any or all information submitted by the company in favor of the use of facts available. . . ." *Id.* Yaou was provided with notice that adverse facts available would be used by Commerce, yet Yaou failed to contact or arrange verification with Commerce. Commerce reasonably concluded that its inability to verify the questionnaire responses was a result of Yaou's failure to cooperate with Commerce.

See 19 U.S.C. § 1677e(a) & (b). Consequently, Commerce properly applied adverse facts available and a PRC-wide rate to Qingdao Zhengri and Yaou.

X. Payment of Dumping Duties to the Domestic Crawfish Industry

1. Contentions of the Parties

Bo Asia et al. contend that the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment")[15] transformed the antidumping law into a "penal" statute and conferred upon United States entities, which are importers, full "due process rights." *See* Bo Asia's Br. at 30–36. The Byrd Amendment provides that antidumping and countervailing duties collected on or after October 1, 2000, by the United States Customs Service[16] shall be distributed to affected domestic parties on an annual basis. *See id.* at 32. Bo Asia et al. assert that under the Byrd Amendment "the amount collected is no longer 'an additional duty,' it is a penalty." *Id.* at 32–33. The Byrd Amendment, rather than equalize competitive conditions in the United States, shifts revenue from importers to the domestic industry and undermines the remedial purpose of the antidumping duty statute. *See id.* at 33. Bo Asia et al. assert that "[d]istributing the collected duties to domestic petitioners is tantamount to penalizing the foreign producers and/or exporters by providing a subsidy to their direct competitors." *Id.* Accordingly, Commerce's actions during the review at issue violates the United States Constitution because the United States respondents were not afforded their full due process rights, including a hearing by a neutral judge, before the imposition of antidumping duties. *See id.* at 33–35.

Commerce responds that Bo Asia et al.'s argument is without any merit. *See* Commerce's Mem. at 55. Commerce points out that the CAFC held that "the Byrd Amendment in no way alters the responsibilities of Commerce, the Byrd Amendment did not convert the antidumping statute into a penal statute. . . ." *Id.* (citing *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1379–1380 (Fed. Cir. 2003)). Accordingly, Commerce contends that the Byrd Amendment "did not confer upon Bo Asia et al. the constitutional protection of the Fifth Amendment or necessitate a hearing by a neutral judge before dumping duties may be imposed." *Id.*

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[15] The Byrd Amendment was enacted after the publication of the *Final Results* as part of the Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 2001. *See* Title X of H.R. Bill 4461.

[16] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

2. Analysis

The Court finds that Bo Asia et al.'s argument is without merit. The CAFC has held that the Byrd Amendment does not change the nature of the antidumping duty statute because it does not impose a penalty. *See Huaiyin*, 322 F.3d at 1379–1380. The duties imposed "remain proportional to the amount of harm caused by the anticompetitive conduct." *Id.* at 1380. Consequently, the duties assessed pursuant to the Byrd Amendment are identical to those assessed prior to its passage. *See id.* The Byrd Amendment enhances rather than detracts from the remedial nature of the antidumping duty statute because "[t]he duties now bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behaviors." *Id.* Pursuant to the CAFC's holding, the Court finds that the Byrd Amendment did not confer upon United States importers the constitutional protections of the Fifth Amendment, including a hearing before a neutral judge, before Commerce may impose dumping duties.

The Court has considered all other arguments raised by CPA and Plaintiffs/Defendant-Intervenors and finds them without merit.

CONCLUSION

This case is remanded to Commerce with instructions to (1) include the submissions made by Hontex on March 19, 2002, and March 20, 2002, as part of the administrative record and explain what bearing, if any, these submissions have on Commerce's final determination; and (2) sufficiently articulate (a) why its collapsing methodology for NME exporters is a permissible interpretation of the antidumping duty statute; and, (b) why its findings warranted the collapsing of Jiangsu and Nanlian. Commerce is affirmed in all other aspects.

Slip Op. 04–48

FORMER EMPLOYEES OF QUALITY FABRICATING, INC., PLAINTIFFS, v. UNITED STATES DEP'T OF LABOR, DEFENDANT.

Court No.: 02–00522

[Defendant's Motion to Dismiss is denied.]

Decided: May 11, 2004

Collier Shannon Scott, (*Adam Gordon* and *John Brew*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Stephen Tosini*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant.

WALLACH, Judge:

OPINION

I
Introduction

Plaintiffs, Former Employees of Quality Fabricating, Inc., brought this action seeking judicial review of the United States Department of Labor's ("Labor") decision denying their eligibility for trade adjustment assistance ("TAA") benefits under Section 223 of the Trade Act of 1974. 19 U.S.C. § 2273 (2000). Defendant filed a Motion to Dismiss ("Defendant's Motion"). On April 13, 2004, the court heard oral argument on Defendant's Motion. Defendant argues that Plaintiffs have failed to state a claim upon which relief could be granted pursuant to USCIT R. 12(b). For the foregoing reasons, Defendant's Motion is denied.

II
Background

On June 28, 2001, Plaintiffs filed a petition seeking North American Free Trade Agreement Transition Adjustment Assistance ("NAFTA TAA") benefits in accordance with 19 U.S.C. § 2331 (1999).[1] Labor registered the petition on July 5, 2001, and designated it Petition #5051. On May 17, 2001, Labor denied Plaintiffs' petition for certification of eligibility to receive trade adjustment as-

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[1] On August 6, 2002, 19 U.S.C. § 2331 was repealed by Pub. L. 107–210, Div. A, Title I, Subtitle A, § 123(a), 116 Stat. 933, 944 (2002). Congress consolidated the NAFTA TAA and the Trade Act of 1974 into the Trade Act of 2002. *See Former Employees of Oxford Auto. U.A.W. Local 2088 v. United States*, Slip Op. 2003–129, 2003 Ct. Intl. Trade LEXIS 128 (Oct. 2, 2003). The repeal does not impact Plaintiffs because the determination regarding their eligibility occurred prior to the effective date of the repeal.

sistance. *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35,140, 35,142 (May 17, 2002). Plaintiffs seek judicial review of Labor's decision denying their eligibility for "TAA" benefits.

Both parties have filed a number of motions in this matter. On July 1, 2003, Plaintiffs filed a 56.1 Motion for Judgment on the Agency Record. Defendant did not file a response to this motion. Subsequently, on August 1, 2003, Defendant filed a Motion for Voluntary Remand in order to "conduct a further investigation and to make a determination as to whether the petitioners are eligible for certification for worker adjustment assistance benefits." Defendant's Motion For Voluntary Remand at 1. Plaintiffs opposed the voluntary remand and on August 11, 2003, filed an Opposition to the Motion ("Plaintiff's Opposition to Voluntary Remand"). On August 22, 2003, Defendant submitted a Reply in Support of Its Motion for Voluntary Remand ("Defendant's Reply") to the court.

As a result of the variance among the issues proposed by the parties in their briefs, on August 27, 2003, the court ordered supplemental briefing to ascertain the parties' precise claims. Thereafter, on August 28, 2003, Plaintiff filed a Motion to Strike Defendant's Reply claiming that a reply was not permitted under the rules of this court and that the Defendant had failed to ask for leave to file its Reply brief. The court scheduled oral argument on these three motions for October 30, 2003. Before oral argument was held, however, Defendant filed its Motion to Dismiss.[2]

III
Jurisdiction

Defendant claims that this court does not have jurisdiction to entertain Plaintiffs' claims. Defendant's Supplemental Brief in Support of its Motion for Voluntary Remand at 3 ("Defendant's Supplemental Brief"); Defendant's Motion at 7. Once jurisdiction is challenged, the Plaintiff must prove that jurisdiction before this court is proper. *United States v. Biehl & Co.*, 3 CIT 158, 160 (1982); *Hilsea Inv. v. Brown*, 18 CIT 1068, 1070 (1994); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 59 S. Ct. 780, 80 L. Ed 1135 (1936). A "mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling: federal courts are of limited jurisdiction, and may not alter the scope of either their own or another

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[2] In their briefs regarding the Motion to Dismiss, both parties reference portions of their other pending motions as well as their supplemental briefs to bolster and explain their arguments regarding Defendant's Motion to Dismiss. *See* Defendant's Motion to Dismiss at 4–5; *see also* Plaintiff's Opposition to Defendant's Motion to Dismiss at 7 n. 2 ("Plaintiff's Opposition"). Accordingly, the court considers the relevant portions of all pending motions and briefs in reaching this decision.

courts' statutory mandate." *See Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986). Moreover, this court must also independently assess the jurisdictional basis for cases before it. *See Ad Hoc Comm. v. United States*, 22 CIT 902, 906 (1998).

The Court Has Jurisdiction Under 28 U.S.C. § 1581(d) to Entertain An Appeal Challenging Labor's Secondarily-Affected Worker Groups Benefit Determination

Defendant argues that secondarily-affected worker group benefits, referenced in the North American Free Trade Agreement Act's Statement of Administrative Action ("NAFTA SAA"), are not part of the Trade Act of 1974. *See* NAFTA SAA, H.R. Doc. No. 103–159, vol. 1, at 450 (1993). Defendant claims that "Congress only granted this Court limited jurisdiction to review only matters that relate to North American Free Trade Agreement Transitional Adjustment Assistance ("NAFTA-TAA") benefits." Defendant's Brief in Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss at 3 ("Defendant's Reply"). Thus, it says that this court does not have jurisdiction over appeals regarding Labor's administration of its secondarily-affected worker group determinations.[3]

Chapter 2 of Title II of the Trade Act of 1974 established benefits, called trade adjustment assistance, for primarily affected worker groups. Trade Act of 1974, P.L. No. 93–618, 88 Stat. 1978, 2019–2020 (1975) (codified at 19 U.S.C. §§ 2271–2275 (1999)). These benefits include income support payments, job search and relocation allowances, and career services. *See Former Employees of Chevron Prods. Co. v. United States*, 298 F. Supp. 2d 1338, 1340 (CIT 2003). Pursuant to 19 U.S.C. § 2273(a), certification of eligibility determinations by the Secretary of Labor must be made

> as soon as possible after the date on which a petition is filed under section 221 . . . the Secretary shall determine whether the petitioning group meets the requirements of section 222 and shall issue a certification of eligibility to apply for assistance under this subpart covering workers in any group which meets such requirements.

Once this determination is made, Labor is required to publish it in the Federal Register along with the rationale for its decision. 19 U.S.C. § 2273(c). Pursuant to 28 U.S.C. § 1581(d)(1), this court has exclusive jurisdiction over any civil action commenced to review "any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act." *See* 19 U.S.C. § 2273 (1999).

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[3] Defendant did not indicate in its brief where jurisdiction to determine such claims would be proper.

On December 8, 1993, Congress approved NAFTA and implemented it through the NAFTA Implementation Act of 1993, P.L. 103–182, Section 101(a)(b), 107 Stat. 2057 (1993) ("NAFTA Implementation Act"). *See Bestfoods v. United States*, 165 F.3d 1371, 1374 (Fed. Cir. 1999). As well as approving NAFTA, Congress approved the NAFTA SAA. NAFTA, H.R. Doc. No. 103–159, vol. 1, at 10 (1993); *see* NAFTA SAA, H.R. Doc. No. 103–159, vol. 1, at 450 (1993); *see Bestfoods*, 165 F.3d at 1374; Plaintiffs' Motion for Judgment on the Agency Record, Appendix 3; *see also* 19 U.S.C. § 3311(a)(2). The SAA described and the NAFTA Implementation Act authorized the promulgation of regulations "as necessary or appropriate to implement immediately applicable U.S. obligations under the NAFTA," NAFTA SAA, H.R. Doc. No. 103–159, vol. 1, at 463, as well as those regulations that were necessary or appropriate to carry out the actions proposed in the SAA. 19 U.S.C. § 3314(b); *see Bestfoods v. United States*, 165 F.3d at 1374. The services provided pursuant to the NAFTA Implementation Act, including those referenced by the SAA, are called transitional adjustment assistance.[4] *See* NAFTA Implementation Act P.L 103–182, 107 Stat. 2057, 2554. The NAFTA SAA explained that one "comprehensive program" was to afford affected workers with the necessary assistance. NAFTA SAA at 672. In order to provide this support, the Administration proposed a transitional worker assistance program having two components. The first component provided benefits to primarily affected workers; the second, to secondarily-affected workers. The NAFTA SAA explained that under the second component

> [W]orkers in firms that are indirectly affected by the NAFTA would be eligible to receive assistance pursuant to the national grant program administered by the Secretary of Labor under Part B of Title III of the Job Training Partnership Act. The Secretary will reserve funds for this purpose. These firms will include suppliers of the firms that are directly affected by imports from Mexico or Canada or shifts in production to those countries. Secondary firms will also include "upstream" producers, such as direct processors, that assemble or finish products made by directly-affected firms. . . .
>
> *Workers in these firms will receive the same rapid response, basic readjustment and employment services, job search and relocation assistance, training and income support available to workers in directly affected firms.* In addition, income support would be available under this component to workers who are covered by a petition certified under the first component of the

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[4] There is no significant difference between transitional adjustment assistance provided for pursuant to NAFTA and trade adjustment assistance provided pursuant to the Trade Act of 1974. *See Former Employees of Chevron Prods.*, 298 F. Supp. 2d at 1340.

> program but who are not eligible for income support under that component because they are not eligible for unemployment compensation, do not meet the tenure requirement, or were unable to meet the enrollment deadline because the first available enrollment date was past the deadline or a course was abruptly canceled.

Id. at 674. (emphasis added).

Pursuant to 19 U.S.C. § 2331(c) (2000), workers who file a petition for adjustment assistance and meet the eligibility requirements are issued a certification of eligibility to apply for assistance by Labor. Those denied certification of eligibility may appeal Labor's denial of NAFTA TAA benefits, pursuant to 19 U.S.C. § 2395(a) (2000), which provides that:

> A worker . . . aggrieved by a final determination of the Secretary of Labor under section 223 of this title, a firm or its representative or any other interested domestic party aggrieved by a final determination of the Secretary of Commerce under section 251 of this title . . . may, within sixty days after notice of such determination commence a civil action in the United States Court of International Trade for review of such determination.

The NAFTA SAA explained that Labor was assigned the responsibility for administering the program and determining whether a group of workers is secondarily-affected. Workers from indirectly affected firms were then eligible to receive benefits and services delivered through the dislocated worker program under the Job Training Partnership Act ("JTPA").[5] The secondarily-affected worker eligibility determination made under NAFTA is separate from the benefits provided by Title III of the JTPA. *See* NAFTA SAA at 672, 674; Plaintiff's Response to Defendant's September 9, 2003 Submission ("Plaintiff's Response") at 4; *see also* Plaintiff's Appendix to its Memorandum of Law Accompanying Plaintiff's Motion for Judgment Upon the Agency Record ("Plaintiff's Appendix") at 3. The NAFTA SAA explains that "the transitional program will draw on the best aspects of existing programs." NAFTA SAA at 672.

The JTPA was fundamentally different from the Trade Act of 1974. The provisions relating to the JTPA did not deal with any of the substantive aspects for requirements relating to petitions, worker eligibility, or notice. Rather, the JTPA focused on funding benefits once eligibility is determined.[6] This is in direct contrast to the Trade Act of 1974, which explains the substantive analysis that Labor is re-

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[5] The JTPA, 29 U.S.C. §§ 1662 et seq. (1994 & Supp. IV 1998), was repealed effective July 1, 2000, by the Workforce Investment Act of 1998 ("WIA"), Pub. L. No. 105–220, § 199(b)(2), 112 Stat. 1059–60. The repeal is not relevant to the court's decision.

[6] The 1988 provisions of Part B of the JTPA contain four sections addressing Federal re-

quired to make when certifying secondarily-affected workers. *See* Plaintiff's Response at 5–6, Exhibits 2A. Title 19 contains specific substantive elements such as petition requirements, pursuant to 19 U.S.C. § 2271; group eligibility requirements, pursuant to 19 U.S.C. § 2272; determinations by the Secretary of Labor, pursuant to 19 U.S.C. § 2273; and program benefits, pursuant to 19 U.S.C. §§ 2291. *See* Plaintiff's Response at 6, Exhibits 2A, 2B. There are no references to the source of funding for secondarily-affected workers within these provisions, and they cannot be construed as containing a source of funding. As noted above, the JTPA did not provide information regarding petition requirements, certification, notice and eligibility for benefits for secondarily-affected workers. The JTPA, accordingly, could not be construed as the source for an entitlement of benefits.

The NAFTA SAA explains the substantive requirements for benefit eligibility, and lacking any statutory authority or legislative history to the contrary, it can only be viewed as the source from which procedural requirements regarding secondarily-affected worker transitional adjustment assistance benefits emanate. This view is supported by the NAFTA implementing statute, 19 U.S.C. § 3314(b), which requires that those regulations "necessary or appropriate to carry out the actions proposed in the statement of administrative action," are authorized. Statutes that relate to the same matter, *in pari materia*, should be read to "work harmoniously together." *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984). Both the entitlement and the funding provision must work in concert to effectuate each other. The court must consider statutes and legislation as a whole, not in a vacuum. To construe the source of the benefits conferred, the SAA, as not affecting the procedures supplying the benefit, in the absence of legislative

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sponsibilities related to Employment and Training Assistance for Dislocated Workers. The sections detail:

(1) the use of funds if state authorities fail to submit a required plan concerning state delivery of services pursuant to 29 U.S.C. § 1662;

(2) distribution of funds by the Secretary of Labor to the states, state performance monitoring, information gathering and technical assistance, pursuant to 29 U.S.C. § 1662a;

(3) circumstances and activities for use of funds, use of funds in emergencies, staff training, and technical assistance, pursuant to 29 U.S.C. § 1662b; and

(4) use of the funds to establish demonstration programs, pursuant to 29 U.S.C. § 1662c.

See Plaintiff's Response at 5, Exhibit 1A. The 1993 revisions to the JTPA added three provisions relating to funding of defense-related adjustment programs and transition assistance related to worker dislocation resulting from the Clean Air Act. *See* 29 U.S.C. §§ 1662d, 1662d–1 & 1662e (1993); Plaintiff's Response at 5, Exhibit 1B.

history to the contrary, offends traditional cannons of legislative and statutory interpretation.[7]

The TAA and NAFTA compose part of the trade related purpose and jurisdiction of this court. Allowing secondarily-affected worker benefits claims to be litigated in other district courts would defeat the Congress' intent and jurisdictional grant. Therefore, because the secondarily-affected workers claims were developed as a direct result of job losses attributed to NAFTA, and this court has jurisdiction to review claims relating to denial of benefits for claims of trade related job loss, it would be illogical, in the absence of contrary authority, to hold that only some denial of benefits are reviewable by this court and others are not.

The Court of International Trade "operates within the precise and narrow jurisdictional limits" granted by Congress. *Biehl*, 3 CIT at 162. Nonetheless, the exclusive jurisdiction of this court and the deference Congress and other courts have given to the CIT's expertise in trade-related matters lends support for the conclusion that jurisdiction over secondarily-affected worker benefits is most appropriately reviewed here. *See e.g.*, *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1274 (Fed. Cir. 2002) (explaining that this court "has expertise in addressing antidumping issues and deals on a daily basis with the practical aspects of trade practice."). In cases involving Customs and trade related matters, other circuits have dismissed suits that impinged upon the jurisdiction of this court.[8] *See United States v. Universal Fruits and Vegetables Corp.*, 2004 U.S. App. LEXIS 4991 (Mar. 17, 2004) (stating that the Ninth Circuit has previously held that "the jurisdiction of the Customs Court [now the Court of International Trade] is exclusive. Even when other, broadly-worded statutes seem to confer concurrent jurisdiction on the district courts, the exclusivity of Customs Court jurisdiction reflects a policy of paramount importance which overrides the literal effect of [other statutes].") (internal citations omitted).

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[7] Moreover, the subsequent legislation by Congress in the Trade Adjustment Assistance Reform Act of 2002 ("Reform Act"), which specifically amended the Trade Act of 1974 to include secondarily-affected worker groups supports the court's analysis. *See* 19 U.S.C. § 2272(b).

[8] In *Cornet Stores v. Morton*, 632 F.2d 96, 98–99 (9th Cir. 1980), a presidential proclamation required to plaintiffs to pay an additional duty on merchandise they imported into the United States. The plaintiffs brought suit in a district court to recover those import surcharges. The district court dismissed the case and held that the matter was within the exclusive jurisdiction of the Customs Court, a decision which the appellate court affirmed. *Id.* Congress intended to ensure uniform administration of the customs laws and other statutes, *see Jerlian Watch Co. v. United States Department of Commerce*, 597 F.2d 687, 691 (9th Cir. 1979), and therefore, the appellate court held that the district court properly dismissed the case. *Cornet Stores*, 632 F.2d at 98–99. "Customs Court jurisdiction is not defeated because a statute or regulation serves other ends in addition to recognized customs purposes, so long as there exists 'a substantial relation to traditional customs purposes.' " *Jerlian Watch Co.*, 597 F.2d at 691 (9th Cir. 1979).

Finally, Labor's actions confirm that it acted with the understanding that secondarily-affected worker benefits are derived from both the NAFTA TAA and the NAFTA SAA. Plaintiffs filed one petition to apply for both primary and secondary benefits, Administrative Record at 2, and Labor conducted one investigation involving the same facts identified in the single petition that was filed and that is subject to this appeal. Labor published one notice of initiation concerning the petition. *See* Administrative Record at 4–5. Both the primary and secondary certification claims before the court involve the same injured parties and the same governmental agency reviewing the same record in this matter. One unified record, covering the agency's actions related to both primary and secondary certification, was certified published regarding its actions and the subject Petition. Labor's interorganizational materials require appeals to be taken to the CIT. Finally, Labor's published notices related to secondary benefits specifically refer to the NAFTA TAA and the NAFTA SAA, which amended section 223 of the Trade Act of 1974, as the basis for granting eligibility for such benefits. Thus, Labor's actions support Plaintiffs' contention that the agency acted pursuant to the requirements of NAFTA and the Trade Act of 1974, and its certification to this court further indicates its belief that this court has jurisdiction over the suit. Furthermore, there is no indication in the legislative history surrounding the NAFTA Implementation Act that Congress or the Administration intended to deny this court jurisdiction over secondary claims, as is here proposed by the Government.[9]

Read together, the NAFTA Implementation Act and NAFTA SAA permit plaintiffs to bring their suit challenging Labor's denial of secondary benefit eligibility. Thus, pursuant to 28 U.S.C. § 1581(d)(1), this Court has jurisdiction over Plaintiffs' claims that Labor's failure to provide notice of the Affirmative Secondary Determination to affected workers was not in accordance with law.[10]

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[9] This conclusion was confirmed by the Reform Act which amended assistance for workers by providing a more direct statutory basis for secondary claims under the NAFTA-TAA SAA, *see* 19 U.S.C. § 2272(b), and exclusive jurisdiction over appeals relating to both primary and secondary claims in the CIT.

[10] In addition to the specific grant of jurisdiction over a party's challenge to a final determination by Labor arising under 19 U.S.C. § 2273, the court also has jurisdiction, pursuant to its residual jurisdiction 28 U.S.C. § 1581(i)(4), over actions pertaining to the administration and enforcement of that provision. Section 1581(i) grants jurisdiction in instances when no other subsection is available or provides inadequate remedy. *See Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). It provides that

> the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(Footnote 10 Continued)

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(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516a(a) of the Tariff Act of 1930.

28 U.S.C. § 1581(i); *see also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1001–02 (Fed. Cir. 2003). Because the procedures for determining entitlement to secondary benefits under NAFTA are derived from the SAA accompanying the NAFTA Implementation Act, any procedural deficiencies must be considered under the court's residual jurisdictional grant.

Therefore, this court has jurisdiction to review any final determinations of the Secretary of Labor with respect to the eligibility of secondarily-affected workers for adjustment assistance pursuant to 28 U.S.C. § 1581(d) and matters regarding administration and enforcement of its determination regarding adjustment assistance to secondarily-affected workers pursuant to 28 U.S.C. § 1581(i)(4). *See e.g., J.S. Stone, Inc. v. United States*, 297 F. Supp. 2d 1333, 1340–41.

Plaintiffs also argued that the existence of an implied right of action concerning secondarily-affected worker benefits arguably exists. *See* Plaintiff's Opposition at 8, n.3. This legal theory has not previously been presented to the court. In *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), the Supreme Court reviewed the doctrine of implied right of action and identified four criteria to be addressed when considering whether an implied right of action exists:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id., 422 U.S. at 78 (internal quotation marks omitted).

The analysis described in *Cort* has since been focused to emphasize legislative intent. *See Suter v. Artist M.*, 503 U.S. 347, 364, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992) ("The most important inquiry here . . . is whether Congress intended to create the private remedy sought by the plaintiffs."). The Court subsequently held that an implied right of action may be inferred from the "language of the statute, the statutory structure, or some other source. . . ." *Northwest Airlines v. Transp. Workers Union of America, AFL-CIO*, 451 U.S. 77, 94, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981); *see also Thompson v. Thompson*, 484 U.S. 174,179, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) ("The intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory scheme, or some other source, the essential predicate for implication of a private remedy simply does not exist.' ").

Plaintiffs claim that the four criteria are met in this case. First, Plaintiffs claim that they are of the class, dislocated workers, for whose benefit the relevant statutory provisions of the Trade Act of 1974, related to the NAFTA transitional adjustment assistance and secondary benefits, were enacted. Second, they claim that the Congressionally-approved NAFTA SAA provides explicit indication of a legislative intent to create the remedy here at issue. They argue that this is especially true because Congress approved the NAFTA SAA, and the NAFTA SAA should be considered a significant and appropriate "other source" of legislative intent giving rise to an implied right of action in this case. Third, Plaintiffs claim that finding an implied right of action as to issues related to secondary worker group benefits is consistent with the underlying purposes of the legislative scheme. Finally, they argue that the cause of action at issue is not one traditionally relegated to state law in an area basically the concern of the states. Rather, it is an area of express federal activity and action, in which the states act only and strictly as agents of the federal agency administering the law

IV
Arguments

Defendant claims that, pursuant to USCIT R. 12(b)(5), the court must dismiss this action because Plaintiffs have failed to state a claim upon which relief can be granted. Its claim that this court lacks jurisdiction is resolved above. Defendant alternately claims that, assuming this court possesses jurisdiction, no justiciable issue exists because Plaintiffs received the relief they requested; thus, the case is rendered moot. Defendant also argues that Plaintiffs abandoned their original claim when they opposed Defendant's Motion for Voluntary Remand.

Plaintiffs claim that their Complaint and First Amended Complaint provide proper notice of issues raised in this appeal of Labor's negative determination and that this court has jurisdiction over all claims raised.

V
Standard of Review

The court's grant of a motion to dismiss is proper "where it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to relief." *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988) (internal citation omitted). When reviewing a motion to dismiss, the court examines a plaintiff's complaint in order to determine whether it sets forth facts sufficient to support a claim. *See NEC Corp. v. United States*, 20 CIT 1483, 1484 (1996). Plaintiffs must give "fair notice of what their claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), but need not set out in detail the facts on which their claim is based. The court assumes "all well-pled factual allegations are true" and construes "all reasonable inferences in favor of the nonmovant." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Ultimately, it is not necessary that the specific relief requested by Plaintiffs be awarded, rather the court need only ascertain that some relief is available. *See Doe v. United States*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *Lada v. Wilkie*, 250 F.2d 211, 215 (8th Cir. 1957). That recovery is remote or unlikely is an insufficient reason to dismiss an action. *See Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996).

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at issue. The court will not reach this issue because it finds an express statutory grant of jurisdiction over Labor's determination of secondarily-affected worker group benefits.

VI
Discussion

Plaintiffs claim that their Complaint properly provided notice of all claims that have been raised and briefed. Plaintiffs argue that they pled in the alternative and that "Labor's failure to comprehend the nature of an alterative argument does not remove that argument from the Court's consideration, as and if necessary." Plaintiff's Opposition at 3. They argue that their First Amended Complaint alleges relevant facts that provide sufficient notice to Labor that its determination on the petition as a whole was being challenged.

The court's consideration of a claim's sufficiency is limited to the facts stated on the face of the Complaint, documents appended to the Complaint and documents incorporated in the Complaint by reference. *See Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). This court's rules as well as the Federal Rules of Civil Procedure require that in order for Plaintiffs to make a legal claim in this court, they must suffer an actual injury and have exhausted all of their administrative remedies. *See Black's Law Dictionary* (7th ed. 1999) (defining standing); USCIT R. 12(b); Fed. R. Civ. Pro. 12(b). On a motion to dismiss, whether on the grounds of lack of jurisdiction over the subject matter, or for failure to state a cause of action, Plaintiffs' allegations are presumed true and their Complaint is liberally construed in their favor. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Even when a court is afforded a statutory grant of jurisdiction, the parties must still meet the requirements of standing, *see 3V, Inc. v. United States*, 23 CIT 1047, 1048 (1999), which are determined by the court. *See Whitmore v. Arkansas*, 495 U.S. 149, 154, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).

Plaintiffs' administrative remedies were exhausted once Labor issued its final negative determination denying their petition. 19 U.S.C. § 2395(a) (2000) (granting workers aggrieved by a final determination of the Secretary of Labor under section 2273 or 2331(c) may, within sixty days after notice of that determination commence a suit in the CIT for review of that determination). Thus, what remains for the court to examine regarding Plaintiffs' pleading is whether they have an injury meant to be regulated by the statute at issue and an actual case and controversy.[11] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed. 2d 351 (1992).

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[11] The Supreme Court in *Lujan*, stated that:

> The irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'. . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent

A

Plaintiffs' Complaint and First Amended Complaint Meet Notice Pleading Requirements and USCIT R. 8

Ms. Margaret Miller, initiated this matter as a *pro se* litigant by letter to the court on July 16, 2002. Judicial review of Labor's decision regarding eligibility for TAA benefits requires that the parties, pursuant to USCIT R. 7, file a complaint and an answer. The Clerk of the Court for the CIT deemed Ms. Miller's letter as the filing of a complaint. On October 3, 2002, Defendant filed its first motion to dismiss, which was denied. *Former Employees of Quality Fabricating, Inc. v. United States*, 259 F. Supp. 2d. 1282 (CIT 2003). On October 9, 2002, Plaintiffs' motion to proceed in *forma pauperis* was granted and counsel appointed to serve generally on behalf of Plaintiffs. On March 11, 2003, Plaintiffs filed their First Amended Complaint and on March 19, 2003, Defendant filed an Answer to that Amended Complaint.

Defendant states that "Plaintiffs' opposition to [its] motion to dismiss offers no explanation as to why this highly specific prayer for relief set forth in the motion for judgment upon the administrative record, is wholly absent from the complaint." Defendant's Reply at 7. It states that "Plaintiffs' multiple, yet unexplained, references to 'notice pleading' . . . are unavailing." *Id.* (internal citations omitted).

Federal Rule of Civil Procedure 8(a), which provides for a simplified standard for pleading, permits the court to dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). USCIT R. 8(a) is the same as the Federal Rule of Civil Procedure Rule 8(a).[12] When the court appraises the sufficiency of a complaint it follows the rule "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

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action of some third party not before the court'. . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 504 U.S. at 560–61 (internal citations omitted). If a claim fails the Article III criteria described in *Lujan*, the Court must dismiss the claim as non-justiciable, regardless of a statutory grant of jurisdiction. *See 3V, Inc.*, 23 CIT at 1048.

[12] Pursuant to USCIT R. 1, scope of the rules, "when a procedural question arises which is not covered by these rules, the court may prescribe the procedure to be followed in any manner not inconsistent with these rules. The court may refer for guidance to other courts. . . ." Thus, when this court or an appellate court have not discussed previously one of the rules of this court, which is identical to the Federal Rules of Civil Procedure, the court looks to the decisions of other courts which have dealt with the civil rule at issue. *See Zenith Radio v. United States*, 823 F.2d 518, 521 (Fed. Cir. 1987).

entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957) (footnote omitted).

The Federal Rules of Civil Procedure govern the substantive requirements for a Complaint. Pursuant to Rule 8, a pleading shall contain:

> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Fed. R. Civ. Pro. 8.

In *Conley*, 355 U.S. at 47–48, the Supreme Court stated that the Federal Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." They only require a short and plain statement of the claim that gives the "defendant notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47 (footnote omitted). Although the rules require that pleadings be concise and direct, they need not be internally consistent. Federal Rule of Civil Procedure 8(e) states that:

> [a] party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. . . .

Plaintiffs are not required to plead a prima facie case in their Complaint. *See Swierkiewicz*, 534 U.S. at 512. When a federal court reviews the sufficiency of a complaint its task is limited; the court reviews the complaint in order to determine whether the claimant is entitled to offer evidence to support its claims. *See id.*.

Under notice pleading requirements, Plaintiffs' Complaint must provide a short and plain statement of the grounds upon which the court's jurisdiction depends, which it does. Under a subheading entitled Jurisdiction, Plaintiffs' First Amended Complaint states that "[t]his Court has jurisdiction over this appeal of the Defendant's decision denying eligibility to apply for TAA benefits under 28 U.S.C. § 1581(d)(1) (2000) and 19 U.S.C. § 2395(c) (2000)." Plaintiffs' First Amended Complaint at 2, ¶2. This is a sufficient statement of their case and gives Defendant proper notice that its final determination is challenged.

To comply with the Federal Rules of Civil Procedure, Plaintiffs' Complaint and First Amended Complaint must show that they are entitled to relief. In Plaintiffs' First Amended Complaint, they alleged that "[o]n July 5, 2001, pursuant to Section 223 of the Trade Act of 1974, 19 U.S.C. § 2273, Plaintiffs filed a petition for TAA benefits with the Employment and Training Administration of the United States Department of Labor ("DOL"), on behalf of certain former employees of Quality Fabricating, Inc." *Id.* at 2 ¶6. They also alleged that "[o]n or about May 9, 2002, the DOL issued a negative determination regarding eligibility in response to the above petition, denying the Plaintiffs eligibility for trade adjustment assistance under Section 223 of the Trade Act of 1974, 19 U.S.C. § 2273. The determination was published in the Federal Register on May 17, 2001. *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35,140, 35,142 (May 17, 2002)." *Id.* at 3 ¶9. Plaintiffs claim that "[t]he DOL's denial of Plaintiffs' petition for certification of eligibility to apply for TAA benefits was not supported by substantial evidence and was not made in accordance with law," *Id.* at 3, ¶13.

These allegations describe the filing of the petition, which sought both primary and secondary certification, and publication of the notice that denied the petition as a whole. The allegations are not limited to primary certification. Plaintiffs' also claimed in their Complaint that their "petition merits further investigation of the facts concerning the impact of imported articles on the decline in sales or production in question and whether there, in fact, was a shift in production of articles produced by Plaintiffs' employer." *Id.* at 3 ¶14. Additionally, in order to meet the Federal Rules of Civil Procedure's pleading requirements, Plaintiffs must make a demand for judgment for the relief sought. The Rules, however, permit the pleader to demand relief in the alternative or of several different types. Plaintiffs' prayer for relief first asks the court to "[examine] the administrative record created by the DOL to make the determination as to whether the DOL properly conducted its investigation into the impact of foreign competition on Quality Fabricating, Inc." *Id.* at 4 ¶9. This requested form of relief requires an examination of the record as a whole. "Because the record certified by Labor is a single record covering Labor's actions on the petition, i.e., all aspects of both the Negative Primary Certification and the Affirmative Secondary Certification, the requested relief necessarily includes scrutiny of all aspects of the documented actions, *viz.*, all actions, (including whether proper notice was provided) related to the Negative Primary Certification and the Affirmative Secondary Determination." Plaintiff's Opposition at 5.

Plaintiffs' Complaint requests that the court issue an order that either (i) overturns the DOL's decision and grants Plaintiffs' applica-

tion for TAA and NAFTA-TAA benefits; or (ii) remands this case to the DOL for further investigation. This second requested form of relief contemplates an alternative remedy sought by Plaintiffs in their Motion for Judgment on the Agency record, seeking either a court ruling awarding benefits, or a remand for further consideration.

Plaintiffs also seek attorney's fees and such "additional and further relief to which Plaintiffs may be entitled." Plaintiffs' First Amended Complaint at 4 ¶d. Their last request for relief contemplates a court order that Labor provide all forms of proper notice and the full scope of undiluted benefits related to the Affirmative Secondary Determination — related to all claims that properly may be before the Court. Thus, Plaintiffs' request also contemplates the court fashioning an appropriate remedy.

The Court of International Trade possesses "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (2000); *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318, 1323 (2003). When the court sits in equity it is not limited solely to the language of the pleadings, especially when the pleadings contain prayers in the alternative. *See Chicago & E. I. R. Co. v. Illinois C. R. Co.*, 261 F. Supp. 289, 307 (N.D.Il. 1966). Instead the court may consider both the legal claims and the equitable claims before it. *See* Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 1283 at 532 (1990) (quoting Federal Rule of Civil Procedure 8(e)).

Plaintiffs' Complaint and First Amended Complaint were filed before the administrative record was provided to them. The court construes the allegations in Plaintiffs' First Amended Complaint in the light most favorable to the Plaintiffs. Plaintiffs claim that they "prepared their pleadings to be broad in scope, encompassing all possible claims arising from or related to the published negative determination." Plaintiffs' Opposition at 6. They claim that their "allegations address the Petition, without limitation, and the relief that is sought included 'such additional and further relief to which Plaintiffs may be entitled.' " *Id.* at 6. Thus, they argue that the issues raised and briefed in the Motion to Dismiss fall within the purview of the allegations pled in the First Amended Complaint.

Plaintiffs' Complaint and First Amended Complaint are notice pleadings. The First Amended Complaint gives notice that the Plaintiffs challenge the notice published by Labor in the Federal Register on May 17, 2002. The notice published in the Federal Register states that Labor has denied "the petition" filed by the Quality Fabricating, Inc. workers. Plaintiffs' Motion for Judgment on the Agency Record at 11–12. That petition sought certification either as a primarily-affected worker group or as a secondarily-affected worker group. Notice of an appeal of Labor's published determination on the petition necessarily gives notice that claims concerning both the determina-

tion concerning primary certification and secondary certification may be raised and addressed.[13]

The court has not yet determined whether Plaintiffs are entitled to any of the relief requested. In order to do so, the court must necessarily scrutinize Labor's actions and rule on both the Plaintiffs' Motion for Judgment upon the Agency Record and the Defendant's Motion for a Voluntary Remand. However, Labor had sufficient notice of the challenged determination and any claims that might flow from that determination from Plaintiffs' Complaint and First Amended Complaint.

B

Plaintiffs' Claims Are Not Moot Because A Justiciable Issue Still Exists

Defendant claims that even if this court possesses jurisdiction, no justiciable issue exists because Plaintiffs received relief, in the form of secondary-affected worker certification by Labor, thus, rendering this case moot. Dismissal for failure to state a claim is proper only where plaintiff can prove no set of facts which would entitle him to relief. *See Constant*, 848 F.2d at 1565. A case is not rendered moot if a portion of the Plaintiff's claims or injuries are redressed by the Defendant prior to judicial review. *See NEC Corp.*, 151 F.3d at 1369. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 895 (1969) (internal citations omitted).

Plaintiffs, in their Motion for Judgment on the Agency Record claim that Labor's alleged lack of sufficient evidence to support their Negative Primary Certification, was an alternative issue. They said it was reached only if the Court found proper Labor's alleged failure to provide adequate notice to the Quality Factory, Inc. workers of the Affirmative Secondary Determination. Plaintiff's Motion for Judgment on the Agency Record at 21–28. The Defendant has not 23 submitted evidence cognizable by the court showing that Plaintiffs received any or all relief that Plaintiffs claim are available to them.[14]

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[13] If Plaintiffs' Complaints had failed to specify the allegations in a manner that provided Defendant sufficient notice, it could have moved for a more definite statement under Rule 12(e) before responding. *Swierkiewicz*, 534 U.S. at 514. Notice pleading focuses litigation on the merits of a claim and "[rejects] the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 48.

[14] On April 9, 2004, Defendant filed a Motion for Leave to File a Status Report and Status Report. In that Motion, Defendant alleged that an attached letter was sent by Labor to the Plaintiffs and that the letter was relevant to its Motion to Dismiss. The Motion included

C

Plaintiffs' Motion for Judgment on The Agency Record did not Abandon Any of Their Claims

Defendant also argues that Plaintiffs "abandoned" their claim concerning the lack of evidence supporting the Negative Primary Certification, the second of the two claims briefed by Plaintiffs, "when they vigorously opposed our motion for voluntary remand." Defendant's Motion at 7. In their Reply brief, Defendant claims that "any claim which is not pressed is deemed abandoned. *De Laval Seperator Co. v. United States*, 511 F. Supp. 810, 812 (CIT 1981)."[15] Defendant's Reply at 6.

Plaintiffs state that they have not waived or abandoned any claims they made or rights they may have in their appeal to this court. Waiver of a right or privilege must ordinarily be evidenced by an *intentional relinquishment* or abandonment of that right or privilege. *See Millmaster Int'l, Inc. v. United States*, 57 CCPA 108, 111 (1970). Defendant's premise that Plaintiffs' abandoned their claim is neither supported by the law's requirements nor Plaintiffs' actions. Plaintiffs have never stated that they abandoned claims made in either their Complaint or First Amended Complaint. Moreover, neither law nor logic links Plaintiffs' alleged abandonment of a claim to Plaintiffs' opposition to Defendant's motion.

Plaintiffs state that they opposed Defendant's Motion for Voluntary Remand because they claimed that remand for the purposes requested by Labor was neither necessary nor appropriate if the court agreed with their claim that Labor failed to provide proper notice of Plaintiffs certification as a group of secondarily-affected workers, and Plaintiffs attendant ability to apply for benefits. While the court has yet to rule on both Plaintiffs' Motion for Judgment on the Agency Record and Defendant's Motion for Voluntary Remand, Plaintiffs' opposition to a remand in and of itself does not waive the claims Plaintiffs made in either their Motion or Complaints currently pending before this court.

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no proper foundation for the attachment, and the court, therefore, orally denied the motion and refused to consider the letter during oral argument.

[15] In *De Laval*, the court ruled on a motion for summary judgment submitted by the defendant, United States. The plaintiff in the case claimed that its merchandise qualified for duty free treatment. Defendant filed a motion for summary judgment claiming that the court's previous decision involving De Laval was stare decisis. In the preceding case, the plaintiff had the opportunity to present evidence with respect to its claims. Additionally, some evidence with respect to its merchandise was adduced by plaintiff through the testimony of a witness. The court stated that the witness had previously discussed the merchandise and in the next sentence stated that "[i]t is axiomatic that any claim which is not pressed is deemed abandoned." *De Laval*, 1 C.I.T. at 146 (1981). This case is not procedurally analogous to the case at hand. Moreover, Defendant's claim that the opposition to a motion is an abandonment of a claim on the basis of the sentence in *De Laval*, is arguable frivolous.

D

Labor's Notice of Affirmative Determination Regarding Plaintiffs' Secondarily-Affected Status

Labor also claims that no justiciable issue remains in this case because, on September 10, 2003, the agency published a notice concerning its May 9, 2002, affirmative determination secondarily-affected worker group status in the Federal Register. Defendant's Motion at 8, Attachment A. Labor says that it "renotified" the state officials of the determination.

Plaintiffs argue that Labor's claim that it "renotified" the state officials is incorrect. During oral argument, and in their brief, Plaintiffs averred that they had examined the administrative record numerous times and that it contained no evidence that Labor ever originally notified the state authorities of the Affirmative Secondary Determination either when it was made in 2002, or at any time thereafter. Plaintiffs argue that Defendant's present claim that Labor has now provided proper notice to the state authorities of the Affirmative Secondary Determination has an insufficient evidentiary basis and is not part of the administrative record. Plaintiffs state that the materials appended to Defendant's Motion include a faxed document that has multiple fax transmission lines and that none of the fax transmittal lines provides any evidence of transmission to the state authorities, and cannot reasonably be relied upon by the court to support Defendant's contention. Defendant has not provided competent evidence that no justiciable issue remains in this case; this argument can not even be considered by the court.[16]

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[16] Plaintiffs also claim that even if Labor sent a copy of its 2002 determination to its state agents, the passage of more than 16 months raises questions regarding the validity of the notice as well as its timeliness. Plaintiffs also argue that belated publication in the Federal Register neither provided them with proper notice nor afforded them complete relief.

Plaintiffs enumerated in their Motion for Judgment on the Agency Record the types and form of notice required by Labor's own procedures and policies, but which they claim Labor failed to provide. These include: (1) publication of the notice in the Federal Register; (2) facsimile transmittal of the final determination to the State NAFTA-TAA Coordinator "within 24 hours after the Certifying Officer has signed it;" (3) notice to the petitioners; (4) notice to the company contact person; and (5) notice to the Office of Worker Retraining and Adjustment Programs. Plaintiff's Motion at 14, App. 5 (App. A ¶ 4). Plaintiffs say that the State NAFTA-TAA coordinator is then required to provide: (1) notice to workers covered by an affirmative finding regarding qualification as a secondary firm that they are eligible to apply for benefits; and (2) notice to the State Dislocated Worker Unit or the affirmative determination, in order to ensure that rapid response and basic readjustment services are made available to all secondarily-affected workers.
See Plaintiff's Motion at 15, App. 5.

Plaintiffs sought relief in the form of measures to "permit all affected workers to avail themselves, retroactively and prospectively, of all benefits to which they would have been eligible has they received proper notice of the Affirmative Secondary Determination, without any limitation due to the passage of time." Plaintiffs' Motion at 29. Plaintiffs claim that the Federal Register notice on September 10, 2003, fails to conform to Labor's own requirements concerning publication and other forms of required notice.

VII
Conclusion

The dismissal standard is extraordinary and viewed with disfavor. In this case, Defendant has failed to prove that no set of facts remain which would entitle Plaintiff to relief. *See Constant*, 848 F.2d at 1565. Plaintiffs have given the Defendant fair notice of what their claims are and the grounds upon which they rest. The standards for dismissal under the court's rules are not met by the facts of this case. Accordingly, the Defendant's Motion is denied.

Once again, the court can not reach this issue because the Defendant has not submitted competent evidence supporting its Motion to Dismiss.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. / DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/23 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	96–09–02244	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/24 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	97–04–00515	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/25 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	97–11–02018	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/26 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	98–6–02312	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/27 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	98–12–03196	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/28 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	99–05–00298	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/29 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	99–11–00727	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/30 Barzilay, J.	Railtech Boutet, Inc.	00–08–00432	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/31 4/22/04 Barzilay, J.	Railtech Boutet, Inc.	01–00813	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges
C04/32 4/22/04 Wallach, J.	Railtech Boutet, Inc.	02–00421	3810.10.00 5%	3810.90.20 Free of duty	Agreed statement of facts	Detroit Welding charges

Index

Customs Bulletin and Decisions
Vol. 38, No. 22, May 26, 2004

Bureau of Customs and Border Protection

CBP Decisions

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

U.S. Court of International Trade

Slip Opinions

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